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TRANSCRIPT OF RECORD

United States Court Of Appeals

TENTH CIRCUIT

No. 5496

JOSEPH S. McDONALD, Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal From The United States District Court
For The District Of Utah, Central Division

Filed October 9, 1956.

United States Court Of Appeals

TENTH CIRCUIT

No. 5496

JOSEPH S. McDONALD, Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee

Appeal From The United States District Court
For The District Of Utah, Central Division

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IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH DISTRICT

No. 5496

JOSEPH S. McDONALD, Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee

[Statement of Points Relied On.]

The points upon which Appellant will rely on appeal are as follows:

1. The Court erred in refusing to dismiss the indictment for failure to allege facts sufficient to constitute the offense charged in the indictment and for uncertainty.

2. The Court erred in denying Appellant's motion for a directed verdict of acquittal. (1)

3. The evidence is insufficient to sustain the verdict. (1)

4. The Court erred in excluding testimony of the witness, Lyle Dickson, as set out on page 43 of the typewritten Narrative Statement of Trial Proceedings, and in its limitation of cross examination of the government witness, Special Agent Daniel M. Smith.

5. The Court erred in excluding Exhibits "HH","NN" and "QQ" offered by Appellant.

6. The Court erred in its instruction to the jury regarding circumstantial evidence and in refusing to give the substance of Appellant's requested instruction No. 10.

7. The Court erred in its instructions to the jury

(1) Argument on these two points will be limited to the question of intent. The amount of unreported income established by the government's case is not disputed.

regarding wilfullness and intent and in refusing to give the substance of Appellant's requested instructions regarding wilfullness and intent.

8. The Court erred in its instructions to the jury regarding the presumption of innocence with which a defendant comes into Court.

9. The Court erred in its instructions to the jury in that the instructions as given weighed heavily in the Government's favor in setting out the Government's theory of the case without explaining to the jury in equal detail the theory of appellant's defense to the case.

10. The sentence imposed by the Court on Count 3 of the indictment is illegal and void in that the allegations of said count constitute a violation of Section 3616 (a), Title 26, U.S.C.A., only and the sentence imposed is in excess of the sentence allowed by law.

Bryant H. Croft
Earl P. Staten
Attorneys for Appellant

Filed October 13, 1956.

McDonald vs. United States of America

IN THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF UTAH CENTRAL DIVISION

Pleas and proceedings before the Honorable Willis W. Ritter, Chief Judge of the United States District Court for the District of Utah, presiding in the following entitled cause:

UNITED STATES OF AMERICA, Plaintiff

vs.

JOSEPH S. McDONALD, Defendant.

No. Cr-63-56, Criminal.

1] Indictment.

The Grand Jury charges:

Count One

That on or about March 15, 1950, at Salt Lake City in the Central Division of the District of Utah, Joseph S. McDonald, who during the calendar year 1949 was married, did willfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1949 by filing and causing to be filed with the Collector of Internal Revenue for the Internal Revenue Collection District of Utah, at Salt Lake City, a false and fraudulent income tax return on behalf of himself and his said wife, wherein it was stated that their net income for the said calendar year was the sum of $5656.00 and that the amount of tax due and owing thereon was the sum of $341.30; whereas, as he then and there well knew, their joint net income for the said calendar year was the sum of $23,341.23, upon which said net income there was owing to the United States of America an income tax of $4528.98, in violation of Sec. 145 (b), Title 26, United States Code.

Count Two

That on or about March 15, 1951, at Salt Lake City in the Central Division of the District of Utah, Joseph S. McDonald, who during the calendar year 1950 was married, did willfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1950 by filing and causing to be filed with the Collector of Internal Revenue for the Internal Revenue Collection District of Utah, at Salt Lake City, a false and fraudulent income tax return on behalf of himself and his said wife, wherein it was stated that their net income for the said calendar year was the sum of $5769.50 and that the amount of tax due and owing thereon was the sum of $481.90; whereas, as he then and there well knew, their joint net income for the said calendar year was the sum of $25,443.95, upon which said net income there was owing to the United States of America an income tax of $5617.92, in violation of Sec. 145 (b), Title 26, United States Code.

2] Count Three

That on or about March 18, 1952, at Salt Lake City in the Central Division of the District of Utah, Joseph S. McDonald, who during the calendar year 1951 was married, did willfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1951 by filing and causing to be filed with the Collector of Internal Revenue for the Internal Revenue Collection District of Utah, at Salt Lake City, a false and fraudulent income tax return on behalf of himself and his said wife, wherein it was stated that their net income for the said calendar year was the sum of $6082.12 and that the amount of tax due and owing thereon was the sum of $506.36; whereas, as he then and there well knew, their joint net income for the said calendar year was the sum of $25,391.57, upon which said net income there was owing to the United States of America an income tax of $6090.70, in violation of Sec. 145 (b), Title 26, United States Code.

McDonald vs. United States of America

A True Bill:
Joseph S. Willis
Foreman Of The Grand Jury

A. Pratt Kesler
United States Attorney

Filed April 24, 1956.

3] [Minute Entry, May 4, 1956.]

Defendant appeared in Court for arraignment on May 4, 1956. The government was represented by C. Nelson Day, Esq., Assistant United States Attorney, and the defendant by Attorney Earl P. Staten.

The defendant waived the reading of the indictment; and upon being arraigned separately on each of the three counts pleaded Not Guilty to all counts.

The defendant was released on his own recognizance. This case will be on the next jury calendar.

WWR

4] Motion To Dismiss

The defendant moves that the indictment be dismissed upon the following grounds:

1. The indictment does not show facts sufficient to constitute the offense charged in the indictment.

2. The indictment is uncertain for the reason that the facts alleged in each count of the indictment constitute a violation of Section 3616 (a), Title 26, U.S.C.A. only, which said violation is a misdemeanor; whereas each count of the indictment charges that the acts alleged therein constitute a violation of Section 145(b), Title 26, U.S.C.A., a felony and defendant is uncertain about the exact offense intended to be charged.

McDonald vs. United States of America

Earl P. Staten
Bryant H. Croft
Attorneys for Defendant

Received copy of the foregoing motion this 19th day of June, 1956.

Filed June 19, 1956.

[Minute Entry, June 25th, 1956.]

17]

* * * * *

The jury retired to the jury room. Defendant's Motion to Dismiss was argued and denied.

* * * * *

WWR

23] [Minute Entry, June 29th, 1956.]

On Friday, June 29, 1956 at 10:00 a.m., the jury retired to the jury room for further deliberation.

Counsel and the defendant being present, the jury at 11:30 a.m. returned into court the following Verdict:

"We, the Jury, duly empaneled and sworn in the above-entitled cause find the defendant, Joseph S. McDonald, not guilty on Count One, not guilty on Count Two and guilty on Count Three, as charged in the Indictment herein filed.

Dated this 29th day of June, 1956.

/s/ Paul E. Wilson
Foreman

The jurors serving in this case were excused until further notice. The Court expressed appreciation for their services.

A presentence report was requested, and imposition of

sentence was set for Monday, July 2, 1956 at 2:00 p.m.

WWR

24] Verdict.

We, the Jury, duly empaneled and sworn in the above-entitled cause find the defendant, Joseph S. McDonald, Not guilty on Count One, Not guilty on Count Two, and ____ guilty on Count Three, as charged in the Indictment herein filed.

Dated this 29 day of June, 1956.

Paul E. Wilson
Foreman.

Filed June 29, 1956.

25] [Minute Entry, July 2nd, 1956.]

This matter came on for imposition of sentence on Monday, July 2nd, 1956 at 10:00 a.m. The defendant was present and represented by Bryant H. Croft, Esquire, and Earl P. Staten, Esquire. The government was represented by C. Nelson Day, Esquire, Assistant U. S. Attorney, and E. A. Tonjes, Esquire.

After hearing statements of defendant's counsel, and of the defendant, the court imposed a fine of $10,000 upon the defendant, and sentenced him to a Federal prison for a period of 18 months.

A ten-day stay of execution was granted.

Bond pending appeal was set at $20,000.

WWR

26] Judgment and Commitment.

On this 2nd day of July, 1956 came the attorney for the

government and the defendant appeared in person and by counsel.

It Is Adjudged that the defendant has been convicted upon his plea of not guilty and Verdict of guilty of the offense of Violation of Section 145 (b), Title 26, United States Code - Income Tax Evasion - as charged in the Indictment, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Eighteen (18) Months.

It Is Further Adjudged that the defendant is hereby fined the sum of Ten Thousand Dollars ($10,000).

It Is Adjudged that a ten day stay of execution is hereby granted.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Willis W. Ritter,
United States District Judge.
O. K. Clay, Clerk.

Filed July 2, 1956.

50] Notice Of Appeal.

Appellant: Joseph S. McDonald, 2920 Morgan Drive Salt Lake City, Utah.

Attorneys for Appellant: Earl P. Staten, Bryant H. Croft, 351 South State Street, Salt Lake City, Utah.

McDonald vs. United States of America

Offense: An indictment in three counts charged that appellant wilfully attempted to defeat and evade a large part of the income tax due and owing to the United States of America for the calendar years 1949, 1950 and 1951, by filing false and fraudulent income tax returns for said years, in violation of Section 145 (b),Title 26, U.S.C.A.

Judgment: On July 2, 1956 a judgment was entered by the Court wherein it was adjudged that appellant was not guilty on counts one and two of the indictment (covering the calendar years 1949 and 1950) and was guilty as charged and convicted on the third count (covering the year 1951) of said indictment. On July 2, 1956, appellant was sentenced by the Court to imprisonment for eighteen months and to pay a fine of $10,000.00 on said third count.

Appellant was granted a ten-day stay and is presently at liberty on his own recognizance.

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the Tenth Circuit from the judgment of conviction on said third count, as set forth in the above stated judgment.

Dated this 11th day of July, 1956.

51] Earl P. Staten
Bryant H. Croft
Attorneys for Appellant

Filed July 11, 1956.

52] [A supersedeas bond and for costs on appeal in the sum of Twenty Thousand ($20,000) Dollars, as fixed by the Court and signed by Edward J. Holmes and Grant S. Jensen, of Salt Lake City, Utah, and approved by the United States District Attorney, was filed in the United States District Court, District of Utah, on July 12, 1956.]

[By orders of August 13, 1956, and September 15, 1956, the time for docketing the cause in the Court of Appeals was extended to October 9, 1956.]

[A stipulation with reference to the summaries of house sales for the years 1949, 1950 and 1951, etc. was filed June 25, 1956. Attached to the stipulation are summaries showing sales for each of the years. Three copies of the summaries have been filed. The stipulation is included in the narrative statement of trial proceedings and appears at page 14 .]

182] Stipulation.

Plaintiff and Defendant in the above entitled matter hereby stipulate that the Narrative Statement of Trial Proceedings, filed with the Clerk of the above entitled Court, is an agreed Statement and may be included in the record on appeal in lieu of the official Transcript of Testimony.

It It Further Stipulated that the Summaries of Plaintiff's exhibits and Defendant's exhibits, filed with the Clerk of the above entitled Court, are agreed upon as correct and may be included in the record on appeal in lieu of the exhibits referred to in such summaries.

Dated this 4th day of October, 1956.

A. Pratt Kesler
United States Attorney
(Signature Illegible)
Assistant United States Attorne
Attorneys for Plaintiff
Bryant H. Croft
Attorney for Defendant

Filed Oct. 4, 1956.

53] Narrative Statement Of Trial Proceedings.

The above entitled case came on for trial on June 25 through 29, 1956 before a jury and the following proceedings were had.

The Court: Now, we have a motion here this morning. The first thing I am going to do is select a jury in this case. This is United States versus McDonald. Are you ready?

Mr. Croft: The defendant is ready, your Honor.

Mr. Day: The Government is ready, your Honor.

The Court: Call a jury.

(A jury was duly impanelled.)

The Court: Now, will you ladies and gentlemen go to the jury room, please.

(Jury retires.)

The Court: All right, Mr. Croft, what is the name of your case?

Mr. Croft: It is the case of United States versus Berra.

The Court: What month is it?

Mr. Croft: May 21, 1956.

The Court: United States versus Berra.

Mr. Croft: Berra. It is reported in 100 L.Ed. 563.

The Court: You had better make your motion.

Mr. Croft: We filed the motion. The motion we filed, your Honor is to dismiss the indictment upon two grounds:

(1) That the indictment does not show facts sufficient to

constitute the offense charged in the indictment.

And the second one is that the indictment is uncertain for the reason that the facts alleged in each count of the indictment constitute a violation of Section 3616 (a) of Title 26 only, which is a misdemeanor violation, whereas each count of the indictment charges that the acts alleged therein constitute a violation of Section 145 (b), Title 26, U.S.C.A., which is a felony violation, and therefore the defendant is uncertain about the exact offense intended to be charged.

(Argument as to motion.)

Mr. Croft: Well, that is our position with respect to our motion.

The Court: Well, it is a good position and I commend you for raising it on behalf of your client, and I commend you for raising it at the motion stage of the lawsuit, because that is the proper place to raise it. It isn't the proper place at the instruction stage.

I don't know what the Supreme Court of the United States is going to say when they get hold of this case or some other case.

Mr. Croft: I hope some other case.

The Court: Some case is going to go to the United States Supreme Court and raise this question, since the Berra case opens it up. Counsel are all put on notice now that there is this problem between 145 (b) and 3616 (a).

There is a very important question of construction to be decided: What did Congress mean in 3616 (a) by specifically making the filing of a false return with the intent to avoid the tax a misdemeanor and what did Congress mean in 145 (b) by providing that anyone who attempts to defeat and evade his tax in any manner, who wilfully attempts to defeat his tax in any manner — which, of course, includes filing of a return -- is guilty of a felony?

3616 specifically refers to a return; 145 (b) does not specifically refer to a return, but 145 (b) has very broad language: "A person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter."

It may be true, as Mr. Day has said, that 3616 (a) applies to all kinds of returns and lists -- I have been leaving out "lists", you know.

The section says: "Whenever any person -- delivers or discloses to the collector or deputy any false or fraudulent list, return, account, or statement, with intent to defeat or evade the valuation, enumeration, or assessment intended to be made," he shall be guilty of a misdemeanor.

Now, that includes any kind of statements made to the Internal Revenue Service, any accounting or lists they hand in, all that sort of thing. In the language they put in "returns." This applies, apparently, to returns other than income tax returns. I think the language is broad enough, as Mr. Justice Black says, to include an income tax return, too, but the question is: What did Congress intend when it wrote 145 (b) and made some offense a felony? It is a more serious offense than filing some list or statement or return, with intent to defeat or evade, because 145 (b) spells out a willful attempt.

The Internal Revenue Service doesn't prosecute cases unless they are flagrant. I am not talking about the one here.

Mr. Croft: It is an exception.

The Court: Most of the cases filed under 145 (b) have been flagrant. They don't file a felony unless they are --

Mr. Croft: The present policy of the Department is to file it if they think they have a prima facie case.

The Court: Well, this has been an interesting point to discuss.

I am going to deny your motion.

After the opening statements of counsel for the government and defendant, the stipulation of counsel was read into the record as follows:

Mr. Day: "It is hereby stipulated by and between the parties to this action that during the years 1949, 1950, and 1951 the defendant sold a number of homes located in Salt Lake County, Utah. There are attached hereto three summaries showing all of the sales for each of these three years. These summaries correctly show the respective purchases, the descriptions of respective properties by street address and legal description, the respective sale prices, credits and charges to the seller, the respective amounts, if any, of mortgages paid or assumed by the buyers, and the respective amounts received by the seller, the defendant herein.

56] "There are attached to each of the yearly summaries schedules of amounts paid during the said years to the defendant on notes and contracts which were executed in connection with the respective real estate sales.

"The schedules show each payment made on each note and contract, the total of said payments by years, and balances remaining due, if any, on each note and contract at the end of each of the years.

"It is further stipulated that each and every payment to the defendant shown by the attached schedule for each year was entered in the receipts and disbursements record books of the defendant.

"In the attached schedules, whenever an amount appears in parenthesis, that represents an amount paid by the defendant; and such payments made by the defendant were entered in such receipts and disbursements record books of the defendant.

"As shown by the records of the Salt Lake County Recorder, title to and ownership of each separate piece or tract of real estate purchased or sold by the defendant during the said three years, and referred to in the said summaries and schedules, was recorded in

the name of the defendant individually or jointly with his wife.

"On or about June 8, 1951, Corey Clark transferred by deed to the defendant a certain building lot located at 2041 Wilson Avenue, Salt Lake City, Utah, of an agreed value of $3000; and Mr. Clark paid to the defendant by check the sum of $2066.60 on October 13, 1951. Such payment and transfer of real estate were made to the defendant as payment for contract work done by the defendant in remodeling Mr. Clark's home. The receipt of the amount of said check was entered in the said receipts and disbursements record books of the defendant.

"On or about May 10, 1951, the defendant entered into a contract to purchase four building lots on Lynwood Drive, Salt Lake City, for a total price of $15,000. He paid during the year 1951 the sum of $4000 on said contract. The said payment was entered in the said receipts and disbursements record books of the defendant. The defendant had and retained the $4000 interest in said lots as of the end of the year 1951.

57] "During the year 1951 A. C. Gunderson paid to the defendant two checks, one for $1200 and one for $1000, for sub-contract work performed on residence at 4668 Holladay Blvd., Salt Lake County. The amounts of said payments were entered in the said receipts and disbursements record books of the defendant.

"During all of the three years, 1949, 1950 and 1951, and prior thereto for many years, the defendant and his sister, Mrs. Emily Carlisle, jointly owned a tract of real estate consisting of several acres in the Holladay area of Salt Lake County, Utah. There were no changes whatever made in the ownership of this property during the said three years.

"In the year 1951 Wayne N. Mason purchased building material for use in the construction of his own home. The defendant contracted with Mason to do part of such work. Thereafter the State of Utah condemned the property for a State Park. Therefore, Mason could not build such home and the defendant agreed to take the said materials

and pay Mason $1400 therefor. Such obligation was outstanding and unpaid on December 31, 1951.

"Dated this 25th day of June, 1956."

Signed by myself and Bryant Croft and Mr. Earl Staten, attorneys for the defendant.

Your Honor, at this time I don't want to take up the time of the Court and jury to read these, but we want them to be offered in evidence showing the sale of all of the homes during these three years, showing the purchaser, the sales price, and other information.

The Court: It is attached to your stipulation?

Mr. Day: Yes, your Honor.

The Court: It may be received.

PAUL HUEFNER, Internal Revenue Service, Collection Division Chief, Salt Lake City Office called as a witness by the government, produced the individual income tax returns of the defendant for the years 1947 through 1952. They were marked as plaintiff's exhibits 1 through 6 and were offered and received into evidence.

Upon cross examination, Mr. Hueffner testified that the income tax returns for the years 1947 and 1948 were brought to court in response to a subpoena from the defendant.

58] Q. With respect to the individual income tax returns for 1949, 1950, and 1951, I notice in each case there is a space on the return for the amount of income tax withheld which is left blank. The withholding tax law was in effect during those years, wasn't it.

The Court: Well, Mr. Croft, the Court will tell the jury that it was in effect. You don't have to take the witness's testimony about that.

Defendant's exhibit "A", consisting of four checks,

was marked for indentification. The witness testified that the numbers stamped in red on the faces of three of the checks corresponded with the serial numbers placed upon Exhibits 3, 4 and 5, the individual income tax returns of the defendant for the years 1949, 1950 and 1951. The fourth check in Exhibit "A" for $109.56 was in payment of a deficiency assessment for the 1949 return. Exhibit "A" was offered and received into evidence.

Defendant's Exhibit "C" was identified as the quarterly social security and payroll tax returns filed by J. S. McDonald for each of the four quarters of each of the years 1949, 1950 and 1951 and was received into evidence.

Defendant's Exhibit "B" was marked for identification. It consisted of a group of checks on which numbers were stamped that corresponded to the numbers on the employment tax returns in Exhibit "C". Exhibits "B" and "C" were received in evidence subject to an objection at this time by the government as to their materiality.

Exhibit "D", consisting of two documents, was identified by the witness as being an employer's application for an identification number signed by J. S. McDonald and a copy of a form sent to the employer indicating the social security identification number assigned to J. S. McDonald. They were offered and received into evidence.

WOODROW WHITE, called as a witness by the government, testified as follows:

Direct Examination

He was acquainted with the defendant and in about October, 1951, he sold four lots in Morningside Heights to the defendant for $4100.00. Plaintiff's Exhibit 7 was identified as a copy of the agreement between the witness and the defendant covering this sale and was received into evidence. The witness only had an option to buy these four lots and on November 27, 1951; Mr. McDonald paid $3000.00 direct to the optioner and received a deed to the lots. The balance of the purchase price

was paid in the following manner: The witness owed Lloyd Jackson for street improvements on other lots. Jackson owed the defendant about $1900.00 for doing part of the improvement work. The witness allowed the defendant a credit of the amount owed to him by Jackson, and with minor adjustments gave the defendant his check for $1,006.80, identified by him as plaintiff's Exhibit 8, to balance their account. Exhibit 8 was received into evidence.

59] Cross Examination

The person to whom the defendant paid the $3000.00 was Kenneth White, a brother of the witness. The balance of the purchase price of $1100.00 was taken care of by the amount due defendant for work he had done in installing curb and gutter and the witness's check for $1,006.00.

RAOUL SPILLSBURY, called as a witness by plaintiff, testified as follows:

Direct Examination

He is an Internal Revenue Agent and met the defendant through the course of an examination. He had determined that Mr. McDonald was dealing in real estate and examined his returns and found the real estate transactions were not on his returns.

Q. What did you thereafter do? A. Thereafter I contacted Mr. McDonald by telephone and I had an appointment with him to meet him at his residence on about June 15, 1954.

Q. Did you go to his residence? A. Yes, I went to his residence about 9:00 o'clock in the morning, and as I pulled up to his residence I saw -- I didn't know Mr. McDonald at the time, but I saw a man on the middle of the lawn with his arms folded.

The Court: A lot of this is utterly immaterial Take the witness in charge, Mr. Day, and ask him the questions of the ultimate facts you want to develop.

Q. (By Mr. Day) You saw this man on the lawn. What then happened, Mr. Spillsbury? A. I asked him if he were Mr. McDonald, and he said, "Yes".

Q. Did you identify yourself to him? A. I iden-
60] tified myself and told him I was an Internal Revenue Agent from the Internal Revenue Service and, of course, he recalled that from our telephone conversation; and I asked him if I could see his income tax records.

Q. What was his response? A. His response was that he would like to talk to his attorney before he let me look at his income tax records.

Q. Did you have any further conversation with him at that time? A. Only that Mr. McDonald said that his attorney would probably call me around 3:00 o'clock that afternoon.

Q. Did you have any further contact with Mr. McDonald or his attorney? A. Yes.

Q. When was that? A. That afternoon his attorney called me on the telephone and said that he would like to have an accountant look over his income tax records.

Q. Did you have a further conversation with Mr. McDonald or his attorney after that? A. Yes.

Q. When was that? A. Within the following few days Mr. Roland Wise, the Chief of the Field Audit Division, came in and introduced Mr. Staten who was representing Mr. McDonald.

Q. Is that Mr. Earl Staten who is here at counsel table? A. Yes, sir.

Q. I see, and what happened then? A. He asked me if they could--about the same conversation as we had on the telephone, if he could have an accountant prepare, or look over the records; and we had a tentative agreement then that he could, and that when this accountant looked over the records, then I would be able to look over them.

Q. Did you have any further meeting, Mr. Spillsbury, or conversations with the defendant Mr. McDonald?
61] A. Not until about October 6, 1954.

Q. And where was that? A. That was at his home on Morgan Drive.

Q. And who was present at that time and place?

A. Mr. Dickson.

Q. Is that Mr. Lyle Dickson? A. Mr. Lyle Dickson,

and Mr. McDonald's wife.

Q. Do you know Mr. Dickson to be a Certified Public Accountant? A. He is.

Q. Can you tell us, Mr. Spillsbury, the substance of the conversation at that time and place?

A. Well, I had looked over some of the records at that time, and I wanted to see some more records, especially those pertaining to the years 1949 and 1950; and Mr. Dickson said at that time that he believed that I didn't have any business looking at the 1949 and 1950 records since the Statute of Limitations expired on the 1949 and 1950 income tax returns.

Q. Did Mr. McDonald have anything to say at that time and place? A. No.

Q. Was that about the substance of your conversation at that time and place? A. Yes.

Q. Mr. Spillsbury, you indicated that you had seen some records or something. Did you make a request of Mr. McDonald and his attorney, other than the one you have indicated on the lawn, for these books and records?

A. Yes, sir. I said I had had several conversations with his attorney, Mr. Staten, and between us it seemed to me that I was entitled to look at the records when the accountant completed his audit.

Q. Did you get to look at these books and records? Were they furnished to you? A. I looked at some of the records.

Q. Can you tell us what records you did look at or which were furnished to you? A. I was furnished the bank statements, cancelled checks, some schedules
62] and summaries pertaining to the 1951 and 1952 income tax years.

Q. Were you furnished any original record books, that is, receipts and disbursements record books, for this time, rather than summaries? A. I don't believe that I was furnished original records, other than the bank statements and the cancelled checks.

Q. Were you ever furnished any records for the years prior to 1950? A. No sir.

Q. Were you furnished any records for the years prior to 1951? A. I don't believe that I was.

Q. Mr. Spillsbury, you indicated that the reason you were interested in Mr. McDonald's return was with regard to these real estate transactions. Were you

furnished any records pertaining to real estate transactions, contracts, deeds, or other documents or records of that nature? A. Not original documents.

Q. Well, were you ever furnished any documents pertaining to those real estate transactions?

A. No sir.

Q. You say "not original documents." Would you explain your answer there, please? A. Well, I had asked to see the sales contracts.

Q. I see. A. Or even copies of the sales contracts. And I wasn't furnished those.

Mr. Day: Your witness, Mr. Croft, or Mr. Staten.

Cross Examination By Mr. Croft:

Q. Mr. Spillsbury, do you recall when it was that you obtained the records that you got from Mr. McDonald?

63] A. Well, I have a piece of paper in my--the records, I didn't take them from Mr. McDonald; I received records from Mr. Staten, who had them.

Q. Do you recall the date that you received them?

A. I would say about December 29.

Q. Of 1954? A. Yes, sir.

Q. And do you recall how long you kept those records?

A. About two weeks.

Q. About two weeks. That long? As a matter of fact, didn't you return those records within two or three days on your own initiative?

Mr. Day: Your Honor, I think there should be a clarification as to what records the witness is talking about here.

The Witness: Well, he is talking about cancelled checks and bank statements.

Mr. Day: I see.

The Witness: And summaries and schedules that were made up by Mr. McDonald's accountant.

Q. (By Mr. Croft) Did you receive the schedules and summaries prepared by Mr. Dickson at a different time

than you received the cancelled checks and bank statements?

A. Not altogether. I had looked at them at Mr. McDonald's home.

Q. But did you take them into your own possession and take them back to your office at the same time that you took the cancelled checks and bank statements?

A. I don't recall that. I recall that I took some records, and I have a receipt which I gave to Mr. Staten at the time I took the records.

Q. And those that you got from Mr. Staten were the bank statements and cancelled checks, is that right?

A. Yes, sir, for the years 1951 and 1952.

Q. What did you do with them after you got them?

A. I attempted to reconcile --

Q. Did you make a check spread? A. No, I didn't make a check spread because there was a check spread made in the schedules.

Q. In other words, you were furnished with the
64] accountant's work papers and schedules spreading the checks, is that right? A. As I recall, there was a check spread.

Q. And you know, do you not, that those check spreads were prepared by Mrs. McDonald? A. I don't know that.

Q. Did you make copies of those spreads?

A. I didn't make copies. We made photostatic copies.

Q. Photostatic copies of them. Well, you were advised, when you first started your examination, that they were in the process of reconstructing their sales, were you not? Mrs. McDonald had, as a matter of fact, at the time you contacted her, had part of those check spreads completed? A. No, I don't believe I was told that. At the time I first contacted Mr. McDonald, he told me he wanted to talk this situation over with his attorney first.

Q. Yes, but when was it after your first contact that you got the check spreads that Mrs. McDonald had prepared?

The Court: Well, that assumes something --

A. When I first saw them —

The Court: That assumes something that isn't in evidence. He said he didn't know Mrs. McDonald had made them.

Q. (By Mr. Croft) Do you have your check spread photostatic copies here? A. I think they are in —
Q. Will you get them.

Mr. Day: I can't see the materiality of this.

Mr. Croft: I think we can tie it in later, your Honor.

The Court: It is hard for me to see that it makes any difference in this lawsuit what the agents did with these documents. I hope what you claim for it is going to justify all this time.

(Defendant's Exhibit "E" was thereupon marked for identification.)

65] Q. (By Mr. Croft) I show you what has been marked Exhibit "E" and ask you to identify that.

The Court: You don't require any identification.

Mr. Day: No, your Honor.

The Court: This comes from your records. Do you offer it, Mr. Croft?

Mr. Croft: I offer it, yes.

The Court: Now, Mr. Day, do you have any objection to this being received in evidence?

Mr. Day: Only the fact, your Honor, that they are not original records. They were summaries prepared by somebody, I don't believe Mr. Spillsbury knew whom, and they were furnished by an attorney, and he made copies of them.

The Court: I see. All right. These are things that were supplied by the attorney for the defendant.

Mr. Day: For the defendant, yes, your Honor.

The Court: I see.

The Witness: These were furnished to me at one time, or at least, I saw them at the time that I received a proposed adjustment to Mr. McDonald's income tax.

The Court: Well, of course, you can't get it in on that kind of an identification.

Q. (By Mr. Croft) These are the photostatic copies of the records that were turned over to you either by Mr. McDonald's attorney or by his accountant Mr. Dickson?

The Court: That assumes something not in evidence. There is no evidence that these are records --

Mr. Day: No, your Honor.

The Court: (Continuing) -- records or books of original entry. Nobody knows what these things are. I don't see why we are wasting any time on this with this witness. He couldn't give you an identification that would get those documents in evidence. These are self-serving instruments supplied the agent by the attorney for the defendant and nobody knows what they are on the agent's side. It is all second hand, so let's pass that with this witness.

66] Mr. Croft: Well, they are photostatic copies of the check spread he has been talking about, part of the original records, and obtained --

Mr. Day: I wouldn't object to them, what they are, which is, of course, papers prepared by somebody; but as far as original records are concerned --

The Court: Well, of course they are not.

Mr. Day: They were furnished to Mr. Spillsbury, and

we wouldn't object to them if he can identify them as those records furnished to him, but they are summaries and schedules furnished by someone. They are not the original records.

The Court: Go ahead, Mr. Croft. Do you offer them?

Mr. Croft: Yes, we offer them.

The Court: Do you have any objection?

Mr. Day: I do not.

The Court: They are received in evidence.

(The document marked Defendant's Exhibit E for identification was received in evidence.)

Q. (By Mr. Croft) You didn't make your own check spread? A. I made some notes and records of them.
Q. Well, what did they consist of? A. I couldn't recall right off hand now, but the summaries and schedules —

The Court: This is all outside the scope of the direct examination. There wasn't anything on direct examination concerning check spreads and records.

Mr. Croft: No, your Honor, he said he got the checks, and I am trying to find out what he did with them.

The Court: Well, that is outside the scope of the direct, what he did with them. I think I will insist upon the rule that you confine yourself to the subject of the direct examination.

Q. (By Mr. Croft) At least, you returned, within two weeks any of those records that were turned over to you, those records that you had received? A. Yes, sir.
Q. You were advised, either by Mr. Staten or Mr. Dickson, were you not, that they were in the process of reconstructing sales and that as soon as they had completed a particular phase of that work, they would turn those records over to you and make them available; until they completed the work, they needed the records

for that work themselves; you were told that, weren't you? A. Yes.

The Court: Let's get right down to the nub of the matter. Did the defendant at any time turn his records over to the agents of the Bureau of Internal Revenue, Mr. Croft?

Mr. Croft: Some of them, your Honor. Those that he testified to.

The Court: Well, then, what is the use of going into conversations about what the defendant would or would not have done? He, in fact, did turn over some of the records.

Mr. Croft: I think it goes to the intent. I think the testimony of the witness is intended to indicate that the defendant refused to cooperate, which I don't think is so.

The Court: Well, go ahead.

Q. (By Mr. Croft) After you returned --

The Court: Why don't you ask him directly whether he cooperated with him or whether he didn't?

Q. (By Mr. Croft) After you returned the records which you had received, did you ever request any additional records? A. Yes, I have requested additional records.

Q. When? A. I talked with Mr. Staten and I said that I would like to have the records in regard to 1949 and 1950.

Q. And you were told at that time, too, that they were in the process of reconstructing sales and as soon as they could turn the records over to you they would be made available to you, isn't that so?

A. Not for 1949 and 1950.

Q. You were also told, were you not, that the accountant was in the process of planning, or intending to file amended returns, and you told him not to do so, that whatever tax that might be determined would be

determined by you in the investigation and could be settled by you at that time, isn't that so?

A. I don't recall that. I don't have any business telling anybody they can't file an amended return.

68] The Court: I wish you would lift your voice so we could hear it better. I missed some.

The Witness: I don't believe I ever told anybody that they couldn't file an amended return.

Mr. Croft: I think that is all, your Honor.

Redirect Examination By Mr. Day:

Q. Mr. Spilsbury, two or three questions with regard to returning these checks and statements and summaries within this two weeks. You did that by reason of the fact that the defendant's attorney required you to, didn't you? A. Yes sir.

Q. Now, with regard to your request for records pertaining to the years 1949 and 1950, were any records at all ever furnished you for those years?

A. No, sir.

Q. Could you give us, Mr. Spillsbury, the number of times, approximately, if you recall it, that you did request these records, not only for 1949 and 1950, but for the other years, too, if you could approximate it for us?

A. I imagine seven or eight times. I don't recall the exact number, but it is about seven or eight times -- not from the defendant, I asked -- I will qualify that. I asked his attorney and I asked his accountant on October 6 if I could see them.

Mr. Day: That is all.

(Witness excused.)

69] GLENN M. ACOMB, called as a witness by the plaintiff, testified as follows:

Direct Examination

He is chief deputy in the Sale Lake County Recorder's

office. Plaintiff's Exhibit 9, identified as photostatic copies of records on file in that office, were received into evidence.

James F. Matthews, called as a witness by the plaintiff produced records of the Salt Lake County Treasurer's office that were marked as plaintiff's Exhibit 10 and received into evidence. On cross examination he testified that there were properties listed on the exhibit relating to persons other than the defendant. Those of the defendants are identified by serial numbers.

REX F. MOSS, called as a witness, testified as follows:

Direct Examination

He is a general contractor, is acquainted with the defendant, and knows him as a contractor in Salt Lake County. In 1948 he did employ Mr. McDonald to do some work, probably on the International Harvester Building. He had no record as to how much he paid him but believed it to be approximately $1500.00. In 1949 McDonald did work for him on the General Electric Warehouse and Service Shop. He formed bond beams for the building.

Q. All right, back to 1949, did you pay to Mr. J. S. McDonald the sum of $2100 as wages, salaries, bonuses, commissions, or other compensation? And I direct your attention to the center of the income tax return.

A. Yes, that would be the year when I paid him part in cash, part in forms and snap ties.

Q. Would it be your testimony, if I understand you correctly, that you had paid him approximately fifteen hundred in cash and four or five hundred in forms?

A. Yes, sir.

Q. You don't recollect the exact amount?

A. No.

Q. (By Mr. Day) Do you recall, Mr. Moss, whether or not you paid Mr. McDonald anything in the calendar year 1947? A. I don't.

Q. Mr. Moss, just two or three more questions. On
70] this work that Mr. McDonald performed, did he do that as a contractor or was he an employee of yours, or

in what capacity? A. As a sub-contractor, so much a lineal foot for forming it.

Q. You paid him on a contract basis? A. That's right.

Q. It would not have been in the category of wages or salaries? A. No, it was by piece work.

Q. So that you paid him on a contract basis rather than on the basis of wages, salaries, bonuses, commissions, or other compensation? A. That is right.

Cross Examination

In 1949 Mr. McDonald did about $2100.00 worth of work for him and he paid him partly in cash and partly in materials. He did not have his cancelled check showing a payment of $1201.50. It was lost in a flood. He paid on the basis of lineal feet. Defendant's Exhibit "F" was identified as the bill submitted to him after deducting the cost of the materials. The handwriting at the bottom was that of the witness. Exhibit "F" was received in evidence. Defendant's Exhibit "G" shows the shoes, panels and snap ties that he gave the defendant in part payment of his work. The amount of $748.50 would be about what it was. Exhibit "G" was received into evidence. Referring to Exhibit "F", the amount of $1201.50 shown thereon was the amount paid by the witness to McDonald.

DENNIS BOWTHORPE called as a witness for plaintiff, testified as follows:

Direct Examination

He knew defendant.

Q. Mr. Bowthorpe, during the year 1950, the calendar year 1950, did you pay any wages, salaries, bonuses, commissions, or other compensation to Mr. McDonald?

A. Yes sir.

He gave him three checks, which were marked as Exhibit 11 and received into evidence. One was for $4043.60 and two for $3500.00 each. They were paid to the defendant under a contract for building an addition on to a building.

71] Cross Examination

These checks covered the cost of materials put into the building. McDonald furnished all of the materials and the amount paid him included the cost of the materials. On redirect examination the witness stated that he did not know the allocation between cost of materials and profit or whether it was the sum of $1250.00 as indicated on plaintiff's Exhibit 4,

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REX SUTHERLAND, called as a witness for plaintiff, testified as follows:

Direct Examination

He was acquainted with the defendant and had business dealings with him in 1951, which involved the construction of an addition to a building. It was handled under a verbal contract. On April 14, 1951 he paid McDonald $1500.00 for remodeling work on the building. He also paid him a check in May, 1952 for work done partly in 1951 and partly in 1952. The work was completed on or about the date of the check. He did not know the state of completion of the work as of January 1, 1952. The work was completed prior to May, 1952. Exhibit 12 was marked and received into evidence.

Cross Examination

McDonald was to furnish the materials that he used and the compensation paid to him included the costs to him of the materials furnished.

PETE PAULOS, called as a witness by plaintiff, testified as follows:

He is an automobile dealer at Magna, Utah, doing business as the Paulos Auto Company. In 1949 that company sold a Chevrolet truck to McDonald. Plaintiff's Exhibit 13 was identified as the company invoice pertaining to the sale. The date of the sale and the cash price paid is as shown on the invoice. Payment was made the day he took delivery. Exhibit 13 was received in evidence.

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Cross Examination

Defendant's Exhibit "H", identified by the witness as the two checks received from McDonald in payment of the car, was received into evidence.

FLOYD SCHOFIELD, called as a witness by plaintiff, testified as follows:

Direct Examination

72] He is a plumber. Plaintiff's Exhibit 14, identified as checks paid to McDonald by the witness, was received in evidence. One was dated January 9, 1951 in the sum of $1500.00 and one February 23, 1951 for $2500.00, both payable to McDonald. The third for $2562.50 was dated May, 1952 and was made payable to McDonald Brothers, Inc. These checks were in payment of a home McDonald built for him. The home was built under contract. I do not recall paying him $430.00, the amount indicated in the 1951 return. The three checks in Exhibit 14 are the only ones made to McDonald. I wouldn't know the amount that would be apportioned to profit as against that apportioned to materials and construction costs.

Cross Examination

McDonald only built a part of the house and the payments made to McDonald did cover the cost of the materials McDonald furnished on the job.

ARTHUR E. JARVIS, called as a witness by plaintiff, testified as follows:

Direct Examination

He is in the industrial supply business. He was acquainted with the defendant. McDonald never worked for him.

The Court: Did you ever pay him any money?

Mr. Jarvis: Indirectly, I think I have.

The Court: Well, tell us about it.

The Witness: I made a verbal contract with Steve, his brother, to build me a partial garage, put the framework up, and I paid the McDonald Brothers Contractors by check.

Q. Do you have that check, Mr. Jarvis? A. I do.

The check, marked as plaintiff's Exhibit 15, was received in evidence. The check was paid in January, 1951 in amount of $720.00.

Q. Would you know, Mr. Jarvis, what allocation was made as to profit or cost of construction in this case by Mr. McDonald? A. This was on cost of material and labor only.

Q. What is that? A. Sir?

Q. What was that, the cost of material?

A. Two by sixes and two by four framework.

73 The Court: What you mean to say is that that check covers both labor and material?

The Witness: Only

Q. (By Mr. Day) Is that correct? A. Yes, the contract that I negotiated with Mr. Steve McDonald was to do this at cost.

Q. Then there was to be no profit in this?

A. That's right.

Mr. Day: I see. Your witness.

Mr. Croft: No questions, your Honor.

L. EUGENE CLISSOLD, called as a witness by plaintiff, testified as follows:

Direct Examination

He is Vice-President of the State Savings & Loan

Association. He produced records of that company. Plaintiff's Exhibit 16 was identified as two checks of that company, one dated June 25, 1951 for $1500.00 and one dated April 9, 1951 for $2500.00. Both were made payable to LeGrand G. McDonald and J. S. McDonald, and were paid by the bank upon the endorsement of J. S. McDonald.

Plaintiff's Exhibit 17 was identified as two sheets of a share or savings account in the name of J. S. or Stevenson McDonald. They cover the years 1949, 1950 and 1951.

Plaintiff's Exhibit 18 was identified as loan mortgage record sheets. Each sheet refers to a different loan. The blue sheets are the disbursing sheets. The other the payment sheet showing payments made by McDonald against the mortgages. They all refer to loans made to J. S. McDonald and his brother Stevenson. Exhibits 16, 17 and 18 were received into evidence.

Q. Now, Mr. Clissold, with regard to these savings accounts, what is the requirements of your bank, if any, with regard to savings account where you are making loans to an individual? A. Well, we ask that each borrower have a savings account. Under our rules and regulations, the savings account establishes them as a member of the association, and we loan only to members, so that each borrower is required to have a savings account with us.

74] The savings account ledger sheets show the balances in these accounts as follows:

December 31, 1948	$462.80
December 31, 1949	883.85
December 31, 1950	1402.54
December 31, 1951	579.93

The loan ledger sheets show the amount remaining due and unpaid on the loan accounts at the end of the years as follows:

Loan No.	Dec. 31, 1948	Dec. 31, 1949	Dec. 31, 1950	Dec. 31, 1951
2228	$7713.71	$7439.09	$7171.40	- 00 -
2229	7732.36	7458.58	7191.89	- 00 -
2477	8242.30	7839.64	7378.91	- 00 -

The witness was unable to locate any other loans to J. S. McDonald. A search was made. Also no other savings or share holder accounts for McDonald were found.

Cross Examination

The State Savings & Loan Association requires the borrower of money to maintain the savings account. The withdrawal on January 31, 1951 of $1442.22 on the savings account was used to pay off a part of loan #2229. The withdrawal was a credit on the loan. The company does require that fire insurance policies be maintained.

The loan ledgers show that the loans made were construction loans, covering the property identified on the exhibit.

The checks made payable to LeGrand and Joe McDonald were in fact disbursements of a loan made to LeGrand McDonald for construction work.

Redirect Examination

After further search of the company records, a record marked as plaintiff's Exhibit 19 was identified as a memorandum payment record showing payments made by McDonald to Paul Romney. It is a collection record and includes in loan file 2234 not only the collection record but also the ledger record of the original loan to McDonald. Exhibit 19 was received into evidence. The collection sheet shows the balances due as of the various year ends in the balance column.

Recross Examination

After the loan was made to Mr. McDonald and Stevenson McDonald, the mortgage given to secure that loan was purchased by Paul Romney from the company and they merely

collected payments on the mortgage for Romney. The mortgaged property given as security is described on the record itself.

75] A further stipulation with respect to testimony of additional witness was entered into between counsel and the stipulation was read into the record as follows:

Mr. Day: It is entitled in this matter and we have labeled it "Second Stipulation."

"It is hereby stipulated by and between the parties to this action as follows:

"The checks, Plaintiff's Exhibit 16, for $1500 and $2500 received in 1951 by LeGrand McDonald and defendant comprised a loan to LeGrand McDonald, and such checks were merely endorsed by LeGrand McDonald to defendant to pay defendant for contract work performed. Such payments included materials and labor. The receipts of such two checks by defendant were recorded in the receipts and disbursements record books of the defendant.

"On December 31, 1951 the defendant owed to McDonald Heating Company, operated by LeGrand McDonald, an amount of $2000 for sub-contract work and the defendant paid to such Heating Company by check dated January 10, 1952 that sum. Such payment was entered in defendant's receipts and disbursements record books.

"For carpenter work, including labor and material, under an oral contract Ernest D. Schettler paid to the defendant on July 7, 1951 the sum of $356.50. Receipt of such payment was entered in the receipts and disbursements record books of the defendant.

"Lloyd Jackson paid to defendant on September 14, 1951, the sum of $6050.00 on curb and gutter contract, including materials and labor. Receipt of such payment was entered in the receipts and disbursements record books of the defendant.

"Zion's Savings Bank and Trust Company made a mortgage

Loan to Laura P. Nicholson on premises at 980 Windsor Street, Salt Lake City. In 1948 the defendant assumed this mortgage when he took this property in on a trade-in on the sale of other property. There was a balance of $1305.86 due thereon by defendant on December 31, 1948, which was paid off in 1949.

76] "Tracy-Collins Trust Company made a loan to defendant on October 4, 1945 for $2030.00 secured by mortgage on the defendant's home. On January 1, 1949 there was a balance due on this obligation of $2030.00; on December 31, 1949 there was a balance due on this on this obligation of $2030.00; on December 31, 1950 there was a balance due on this obligation of $1946.74; on December 31, 1951 there was a balance due on this obligation of $1432.39.

"Continental Bank and Trust Company had made an FHA loan to Robert F. Jones. This was assumed by defendant in 1951 when defendant repossessed this home from Mr. Jones, and there was a balance due on this loan by defendant of $85.88 as of December 31, 1951.

"On December 30, 1948 the American Housing Company issued its check to the defendant for $2020.81 as final draw on construction loan made to defendant by Prudential Insurance Company on premises at 2493 East 2900 South, Salt Lake City. This check was deposited by defendant in his bank on January 6, 1949 and recorded in his receipts and disbursements record books. On January 10, 1949 American Housing Company issued their check for $1750.84 to defendant which he deposited in his bank account on January 13, 1949 and entered the receipt of same in his receipts and disbursements record books. This check was in final payment of sales price of this house at 2493 East 2900 South, Salt Lake City, which was sold by defendant to McRay Nielson on December 30, 1948.

"Records of the Holladay Water Company and the Big Cottonwood Upper Canal Irrigation Company show the defendant was the owner or co-owner of shares of water stock in such companies on the dates and in the number of shares as indicated below."

"And then we have listed, your Honor, the name in

which the shares are held and first would be the defendant alone. Then as number of shares on January 1, 1949, eleven; on December 31, 1949, eleven; on December 31, 1950, eleven; and on December 31, 1951, eleven shares also.

77] Then the next, number of shares, the defendant and Stevenson McDonald jointly, and then as number of shares, 59 on January 1, 1949; 59 on December 31, 1949; 59 on December 31, 1950; and 56 on December 31, 1951.

The next group of shares was in the name of defendant and Emily Carlisle, jointly, and the number of shares on January 1, 1949 was 3; on December 31, 1949, 3; on December 31, 1950, 3; and on December 31, 1951, 2 shares.

Now, as to the Holladay Water Company, the defendant alone had as number of shares on January 1, 1949, 2; 2 shares on December 31, 1949; 1 on December 31, 1950; and 1 on December 31, 1951.

The defendant and his wife jointly had one share on December 1, 1949 --

Mr. Croft: January.

Mr. Day: Excuse me.

Mr. Croft: January 1, 1949.

Mr. Day: 1/2 share on December 31, 1949; 1/2 share on December 31, 1950; and 1/2 share on December 31, 1951.

The defendant and Stevenson McDonald jointly held 67 shares on January 1, 1949; 67 shares on December 31, 1949; 67 shares on December 31, 1950; and 61 shares on December 31, 1951

The defendant and Emily Carlisle jointly held 7 shares on January 1, 1949; 5 shares on December 31, 1949; 5 shares of December 31, 1950; and 5 shares on December 31, 1951.

Mr. Croft: Mr. Day, I believe in connection with that particular stipulation we also agreed, and we might orally do it here, to stipulate that all of the shares of stock recited in this written stipulation had been held by the defendant and the other parties named in the stipulation for a number of years prior to January 1, 1949.

Mr. Day: That is true, your Honor. They were held

for quite a number of years.

Mr. Croft: And also that the transfer of the shares of stock as shown by the stipulation was made in connection with the sale of land in that area.

78] Mr. Day: That is true, also, your Honor, and we would so stipulate.

Mr. Croft: And that Stevenson McDonald is Mr. McDonald's brother and that Emily Carlisle is his sister.

Mr. Day: That is correct also, your Honor, and we so stipulate.

Further with this written stipulation:

"The defendant owned and possessed the following described motor vehicles on the dates indicated:"

First a 1942 Chevrolet truck, and we have the motor number, but I won't read it. It was owned and possessed by the defendant on January 1, 1949; on December 31, 1949; and on December 31, 1950.

A 1947 Oldsmobile automobile was owned and possessed by the defendant on January 1, 1949; December 31, 1949; December 31, 1950 and also on December 31, 1951.

A 1948 Oldsmobile was owned and possessed by the defendant on December 31, 1949; on December 31, 1950; and on December 31, 1951.

A 1948 Chevrolet truck was owned and possessed by the defendant on December 31, 1949.

A 1947 GMC truck was owned and possessed by the defendant on December 31, 1949; on December 31, 1950; and on December 31, 1951.

A 1942 White truck was owned and possessed by the defendant on December 31, 1951.

A 1949 International truck was owned and possessed by the defendant on December 31, 1950 and on December 31, 1951.

An 1951 International truck was owned and possessed by the defendant on December 31, 1951.

Another 1951 International truck was also owned by the defendant on December 31, 1951.

"At the end of 1951 the defendant still had the International tractor taken in by him on sale of home to Edith Peterson (shown in first written stipulation). In February, 1952, the defendant was allowed $3000 on such tractor on a trade-in on another tractor purchased from H. H. Nielson.

79] "On October 6, 1948, the defendant sold real estate at 1553 South 8th East, Salt Lake City, to Golden A. Buchmiller under Uniform Real Estate contract for $14,000. After down payment of $1505.25 there was a balance due on such contract to defendant by Buchmiller of $12,494.75. The receipt of the down payment as above indicated was entered in the defendant's receipts and disbursements record books. On January 1, 1949, there was a balance due to defendants from Buchmiller of $12,452.02. On March 26, 1949, Buchmiller refinanced his home and $10,635.70 was paid to the defendant and entered in the defendant's said record books. The balance of $1737.12 was covered by a promissory note given by Buchmiller to the defendant. The balance due on this note on December 31, 1949 was $1602.72. The balance due on December 31,1950 was $1385.44 and the balance due on December 31, 1951 was $1,155.94.

"At the end of 1951 there was due and owing by defendant to General Plumbing and Heating Company the sum of $2000 which was paid by the defendant on January 9, 1952, and such payment entered on defendant's said record books.

"At the end of 1951 there was due and owing by the defendant to A. J. Dean Ready Mix Concrete Company the sum of $3236.67 on which account the defendant paid $1757.33 on January 11, 1952. Such payment was entered in the defendant's said record books.

CLARK E. MAXFIELD, called as a witness for plaintiff, testified as follows:

He was supervisor of the bookkeeping department of the

First Security Bank, Sugarhouse Branch. The witness produced photostatic copies of bank statements of the account of J. S. and May McDonald, which were marked as plaintiff's Exhibit 21 and received into evidence. At the same time defendant's Exhibits "I", "J" and "K", which were the bank statements and cancelled checks on the same account for the years 1949, 1950 and 1951 respectively, were offered and received into evidence.

Defendant's Exhibit "L", identified as the bank statements of the McDonald Brothers account at the First Security Bank for the period beginning December 31, 1948 through June 30, 1952, were received into evidence.

80] Plaintiff's Exhibit 22, a photostatic copy of the signature card on the McDonald Brothers account, was received into evidence.

Plaintiff's Exhibit 20 was received into evidence.

It was stipulated that plaintiff's Exhibit 23 was a ledger card of loans made to J. S. McDonald by the First Security Bank for the period beginning April 14, 1948 through April 1, 1953 and it was received into evidence. The exhibit shows the balance of each individual loan.

Cross Examination

The exhibit lists several loans to McDonald. Some are renewal loans and can be identified by the fact that the date the prior loan was paid off and the date and amount of the new loan are the same.

The exhibit does not show a new loan of $2000.00 to McDonald on March 23, 1949. It shows a loan of $2000.00 on April 25, 1949; one of $2500.00 on November 15, 1949; one of $5000.00 on March 15, 1951; one of $5000.00 on July 28, 1951 and one of $5000.00 on November 26, 1951. The exhibit does not reflect loans of $3000.00 on or about November 29, 1950 or $1860.00 on October 15, 1951.

Mr. Maxfield, after further examination of the bank records, was recalled as a witness at a later time, and identified plaintiff's Exhibit 47 as records on the collateral which the bank held on each of three loans made to J. S. McDonald. The exhibit was received into evidence. The witness made a search but was unable to find records which would show the balances due on those loans as of the end of the years 1950 or 1951. It was stipulated that on the loan of $3262.56 made on November 28, 1950, the balance at the end of 1950 was the same amount and at the end of 1951 the balance was $1398.24; on the loan of $3227.04 made on April 3, 1951, the balance at the end of 1951 was $1792.80; and on the loan of $2027.40 made on October 31, 1951, the year end balance was $1802.16.

Re-cross Examination

It was stipulated that $262.56 of the loan of $3262.56 were loan costs and that McDonald received $3000.00 on that loan; also that $227.04 of the loan of $3227.04 were loan costs and that $177.40 of the loan of $2027.40 were loan costs.

81] Defendant's Exhibit "R" was identified as copies of three deposit slips for deposits made to the McDonald Brothers account in the First Security Bank and was received into evidence.

M. KENNETH WHITE, called as a witness by plaintiff, testified as follows:

Direct Examination

He has had business dealings with McDonald consisting of selling lots to him and having McDonald do contract work for him. In 1949 the witness paid McDonald $2738.00 for contract work. Plaintiff's Exhibit 24, identified as the five checks paid McDonald for this work, was received into evidence. It was stipulated that the receipt of these five checks ($418.00, $500.00, $450.00, $550.00 and $820.00) were entered in McDonald's record books on or about the dates of the checks.

It was further stipulated that McDonald paid the witness five checks for the purchase of lots in Morningside Heights, East Morningside Heights or Canyon Rim, namely $1000.00 on February 7, 1951; $2000.00 on March 21, 1951; $3500.00 on July 20, 1951; $19,500.00 on August 25, 1951; and $24,011.35; and that the payment of these amounts to the witness were entered in McDonald's record books.

Aside from the $2738.00 previously testified to, the witness did not know of any other sums that he paid to McDonald for wages, bonuses, salaries, commissions or other compensation during 1949, 1950 or 1951. The payments made were for contract work performed. He did transfer two lots in Vaughn Subdivision to McDonald for improvements in 1949. It was for contract work performed but he did not have the information as to what work or labor was given for these two lots.

On March 16, 1951 he entered into a contract to purchase twenty lots for $1050.00 per lot on which improvement work in the sum of $10,537.00 was to be done. It was later adjusted another $276.00. McDonald did perform work in those amounts for him and in exchange lots were transferred to McDonald in the spring of 1952. He did not know what time the contract work was completed or if done prior to December 31, 1951. Plaintiff's Exhibit 27 was identified as a uniform real estate contract entered into between him and McDonald and attached to it is an agreement in connection with the same contract which refers to part of the method of payment and is concerned with improvements that are to be applied to the contract, part of which improvements were to be done during 1951.

Exhibit 27 was received in evidence. The witness
82] identified certain deeds contained in Exhibit 9 as deeds executed by him to McDonald for lots involved in their various transactions. The sales price per lot in Morningside Heights was $750.00 and in East Morningside it was $1050.00.

(Plaintiff's Exhibits 25 and 26, identified as records of William Thayne, a real estate agent who handled the sales of two properties, were here received into evidence upon stipulation of the parties.)

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Cross Examination

The five checks paid McDonald in 1949 totaling $2738.00 was paid for carpenter work and included the cost of materials furnished as well as labor.

The $2000.00 check paid in March, 1951, was a down payment on the contract of March 16, 1951 which is all that was paid on that particular contract in 1951.

Defendant's Exhibit "M" was identified as the five checks he received from McDonald in 1951 in payment of lots. It was received into evidence.

Redirect Examination

The two large checks, for $24,000 and $19,000 were for lots in Morningside Heights.

HAYDEN M. CALBERT, called as a witness by plaintiff, testified as follows:

Direct Examination

He is manager of the loan department of Prudential Federal Savings and Loan Association. Plaintiff's Exhibit 28 was identified as collection records on contracts of McDonald with Charles Maxwell, Alvin Metcalf, Morris E. Rassmussen and David Turner which that bank has collected for McDonald. Exhibit 28 was received in evidence. These records show under the balance column the balance due and owing on these various contracts on the dates indicated and cover the years 1949, 1950 and 1951.

Plaintiff's Exhibit 29, identified as a savings account of McDonald at that company into which net proceeds from these contracts were paid, was received into evidence. This is the only savings account McDonald had there. This record shows in the second column from the right side the balance in the account on any particular date.

83] Plaintiff's Exhibits 31 and 32 were identified as records showing pay outs of construction loan funds

and records of the loan acounts themselves. Both were received into evidence. Exhibit 31 shows the balances due McDonald on the construction loans from time to time. The original amount of the loan appears in the credit column at the top of the page. The "pays" are the funds disbursed to McDonald or charges in connection with costs, and appear in the debit columns of each sheet. Exhibit 32 are ledger account cards showing the amount of money and the dates that McDonald has paid on the various loans. They show the amounts due and owing by McDonald to that company on any particular date shown on the cards. The exhibit includes all loans made to McDonald that he was able to find. The FHA has no requirements with respect to pay out of loans. The Prudential Federal pays out according to the percentage of completion of the home. The percentage of completion is determined by inspection of the properties. Generally the company's appraiser, Sidney E. Mulcock does it.

On Exhibit 31 the ledger sheet refers to several loans. Several lots were pledged to secure one loan.

Plaintiff's Exhibit 33, identified as loan files and records pertaining to seven individual loans made to McDonald was received into evidence. The mortgages in the files show which lots were pledged as security for each loan. These loan files do show draws made by McDonald on January 8, 1952, and inspection reports upon which the draws were made are in each file. The files also show what part of the loan was apportioned, if any, to the lots other than the lot upon which the house was to be built.

Cross Examination

Exhibit 28 relates to collections made from four individuals who had purchased homes from McDonald. Those collections started back in 1947 and 1948. The company's procedure was to make a construction loan to McDonald to build a house and give him a check for a part of the loan and as building progressed, subsequent draws would be made by him. In 1947 and 1948 the construction loan was usually for $7950.00. McDonald would not get the entire amount because there would be certain costs

in connection with the loan and interest during the course of construction that would be deducted from the $7950.00. In each case it might be as high as three to five hundred dollars. The mortgage would be for the full amount. In the case of the four buyers whose ledger cards are in Exhibit 28, the witness' company collected from the buyers. Notations on these ledgers in Exhibit 28 show that the collections were applied to McDonald's payments that were due on the mortgages. Payments on, say Metcalf's contract, would be applied to pay off the construction loan on Metcalf's home. In some instances if any were left over, it would be applied to pay off the mortgage on other loans or be put into the savings account which was merely an account into which the company placed any small excess that they might receive from the buyers over and above what was needed to pay off the amount due on McDonald's mortgages. After the corporation was formed in 1952, the savings account still remained in the names of J. S. and Eveline May McDonald.

The loans covered by the numbers 3727, 3728 and 3662 through 5 were all loans made in the latter part of 1951 and would have been handled in the same manner as the earlier loans. They too would have loan costs which reduced the amount McDonald actually received from the loans. None of the loans were completed by the end of 1951, so that at the end of 1951 there is no way of telling exactly what stage of construction was completed. Generally the cost of construction of homes exceeds the construction mortgages.

Redirect Examination

The files would show if there was an inspection as of January 8, 1952 and if so, the inspection would show the percentage of completion of the home.

SIDNEY E. MULCOCK, called as a witness by plaintiff, testified as follows:

Direct Examination

The witness was a member of the Society of Residential

Appraisers and had been an appraiser for forty years. It was stipulated that Mr. Mulcock was well qualified as an appraiser. In one of the files the appraisal report of January 8, 1952 bears his signature. It shows the percentages of completion of these premises as of that date. It was stipulated that wherever the file contains Mr. Mulcock's appraisal that it was executed on the date marked on the report. The appraisal reports show the percentage of completion for the purpose of permitting Prudential Federal to make payments to McDonald for sums due for work completed. When construction started an estimate of the total construction cost of each one of these places was made and put in the report.

85] Cross Examination

The estimate would be computed from plans and specifications, since "we" know construction costs pretty well. McDonald nearly always put more into his houses than the plans and specifications called for.

LUCILLE R. WRIGHT, called as a witness by plaintiff, testified as follows:

Direct Examination

Mrs. Wright is Vice President and Secretary-Treasurer of Security Title Company. Plaintiff's Exhibit 34 is that company's file numbered 44940 relating to a transaction between J. S. McDonald and Kenneth White on Lots 219 and 220 in Morningside Heights. It was received into evidence.

The first sheet is a check voucher drawn on the escrow account in the sum of $1491.80 made payable to M. Kenneth White for payment for deeds to said two lots. The next sheet is a ledger sheet from the escrow ledger account showing receipt of $1512.80 from May D. McDonald on December 3, 1951. The $1512.80 was dispersed by the payment of $1491.80 to White and $21.00 to Security Title Company.

Cross Examination

Defendant's Exhibit "N" is the check received from

Mrs. McDonald on that transaction. It was received into evidence.

W. HAROLD WARWICK, called as a witness by plaintiff, testified as follows:

Direct Examination

He is Assistant Chief Underwriter for the Federal Housing Administration. Plaintiff's Exhibit 35 was identified as financial statements of J. S. McDonald which were presented to F.H.A. in the regular course of business. It was received into evidence. Plaintiff's Exhibit 36, identified by the witness as a mortgage application of Eugene Lippa, was received into evidence.

86] Cross Examination

Defendant's Exhibit "O" was identified by the witness as a financial statement dated April 5, 1950, which was furnished to the F.H.A. and was a part of that agency's file. The exhibit was produced by the attorney for the government for use by the defendant, it having been previously subpoenaid and used. It was received into evidence.

ROBERT W. BREWER, called as a witness by the government, testified as follows:

Direct Examination

He is credit manager for Western Savings and Loan Company, formerly Western Loan and Building Company. A search was made for any records pertaining to wages, salaries, bonuses, commissions and other compensation paid to the defendant but none was found.

Plaintiff's Exhibit 37 was identified as the savings account ledger of J. S. and Eveline May McDonald and was received in evidence. This exhibit shows in the balance column the amount on deposit in this account on the dates indicated in the date column. It is the only savings account at that company in the name of the defendant.

Plaintiff's Exhibit 38 was identified as ledger sheets of construction loans as it was originally set up and gives the entire history of the loan during the course of construction. Plaintiff's Exhibit 39 is the ledger that is set up at the time payments are to begin on that loan account.

Q. (By Mr. Day) Are these all of the ones that were made? A. Yes, they are all that was made in that period. However, there are even six loans that are included in there which you have asked for in the subpoena which the loans were not made in 1951. The F.H.A. commitment was made in 1951, but the loans were not made until 1952.

Exhibits 38 and 39 were received into evidence. Referring to Exhibit 38 the total amount of the loan appears at the top of the sheet. Under the column "draws" appears the amounts drawn by McDonald during the course of construction. The dates of the draws and other charges also appear. With respect to the six sheets covering loans that were made in 1952, the charge appearing on the first line of each sheet as of December 15, 1951, is a charge to McDonald for an F.H.A. investigation fee that must be sent at the time the application is filed to get a commitment. The commitments were received in 1952.

87] Exhibit 39 shows the amounts which would be due by McDonald as of any particular date indicated on the ledger sheet. The ledger sheets are for each one of the loan files requested in the subpoena.

Plaintiff's Exhibit 40 was identified as a loan file, #20943, on a loan made to McDonald on 3203 East Kenton Drive on July 12, 1951. It was received in evidence. The F.H.A. loan in this case was $9900.00. By examination of Exhibit 38, it was stated that on that loan McDonald drew $6000.00 on July 16, 1951; $2500.00 on August 8, 1951 and $900.00 on October 16, 1951. As of December 31, 1951, McDonald had drawn $9400.00, but with expenses charged to him the amount due from McDonald as of that date was $9861.82. The disbursement of the money is made as the job progresses, depending upon the percentage of completion. The records contained in Exhibits 38, 39 and 40 show that this house was completed on December 31, 1951.

Cross Examination

As a matter of fact, during the years 1949, 1950 and 1951 the Western Loan made many other loans than the ones represented by the exhibit offered.

Q. (By Mr. Croft) You have them all with you?
A. Yes.
Q. Let's see those. A. They are back in my brief case.
Q. Will you get them please?

Mr. Day: Mr. Croft, perhaps, to save time, if your purpose is to prove that the money was deposited to the defendant's account, we could certainly so stipulate.

Mr. Croft: Well, I would like to put them in evidence, if you don't mind.

Defendant's Exhibit "P" consisting of the ledger loan accounts of Western Loan covering all loans made during 1949, 1950 and 1951, in addition to those offered by the government, was offered and received into evidence. These records show every disbursement made by Western Loan to McDonald. Part of the loan made was withheld as costs and interests up to the time of closing of the loan. This is true on each loan made.

FLOYD H. THATCHER, called as a witness by the plaintiff, testified as follows:

88] Direct Examination

He is an internal auditor of First Federal Savings and Loan Association. That company has no records of salaries, wages, bonuses, commissions or other compensation being paid to McDonald in 1949, 1950 or 1951.

Plaintiff's Exhibit 41 consists of the ledgers on original construction loans to McDonald, showing the cash advances made and the costs. Exhibit 42 consists of ledgers showing the loan balance of the loans that were retained by the company paid by McDonald. The witness made a search for any other loans not covered by the exhibit,

but could find none. Exhibits 41 and 42 were received into evidence. The witness after searching could find no records of any savings accounts, share accounts or other accounts.

JOHN E. EDWARDS, called as a witness by plaintiff, testified as follows:

Direct Examination

He is manager of the Salt Lake City office of the Prudential Insurance Company of America.

Plaintiff's Exhibit 43 was identified as the company's loan files and ledger cards pertaining to several loans made to McDonald. The exhibit was received into evidence. The ledger card shows each disbursement on the construction loan and the gross amount dispersed in the corner labeled "Construction Loan Disbursement." A closing statement is also in the file. The repayments are noted on the upper part of the card and shows each monthly payment made by McDonald, or the present borrower. The amount of interest and principal and the outstanding balance are on a mimeographed form in the files. The date of payment is also shown. The column "Principal Balance" shows the outstanding balance after each payment is applied. It shows the amount due and owing as of any particular date. These loans are FHA insured loans and the FHA commitment is in the file. The application to the FHA does show the cost of the lot and the date the lot was acquired. The applications show that the cost of construction of each home would be $8150.00.

89] Cross Examination

The values just mentioned are values set up in the F.H.A. application and are presumed to be McDonald's estimates. Five additional files on loans made on the Grandview properties were produced by the witness, who stated that each file contained an application for a mortgage loan. The five applications were extracted from the files, marked as defendant's Exhibit "S", and the exhibit was received into evidence.

Part of the construction loan is withheld as a cost of the loan.

Redirect Examination

The draws on the construction loans are made as the work progresses and were based on the percentage of completion of the job.

HOWARD HOPKINS, called as a witness by plaintiff, testified as follows:

Direct Examination

He is employed as office manager of the International Harvester Company. He produced a record of that company which was marked as plaintiff's Exhibit 44 and received into evidence upon stipulation without further identification. Exhibit 44 does not include invoice #4599 dated March 15, 1950. It had been destroyed. It was, therefore, stipulated that invoice #4599 reflected sale of an International Harvester truck to McDonald on March 15, 1950 for $3082.13 on which McDonald traded in a 1948 Chevrolet truck for $1632.13 and paid the difference of $1450.00.

Cross Examination

Defendant's Exhibit "Q" identified as three checks of McDonald Brothers, made payable to the International Harvester Company, in payment of the three invoices, was offered and received into evidence.

FRANCES M. HALL, called as a witness by plaintiff, testified as follows:

Direct Examination

She is Assistant Secretary, Zion's Benefit Building Society. She produced records relating to two accounts which were identified as plaintiff's Exhibits 45 and 46 and which were received into evidence upon stipulation without further identification. Both ledgers show the quarterly balances due from the defendant. The amortization

is quarterly.

90] Cross Examination

Both loans were made directly to McDonald.

BERNARD BROCKBANK, called as a witness by plaintiff, testified as follows:

Direct Examination

The witness produced files of his office, the Brockbank Realty Company, pertaining to sales made in 1948 for McDonald. The files, four in number, were marked as plaintiff's Exhibits 48, 49, 50 and 51 and were offered and received into evidence.

One file, (Exhibit 48), covers a sale to David Turner. The witness could not say what the receivable on this contract was as of January 1, 1949. The only date he had was January 30, 1948, the date of the contract when the balance was $8150.00. He did not know if payments were thereafter made on the contract.

Exhibit 49 is file on a sale to W. A. Thomas. The contract date is August 2, 1948 when the balance was $11,800.00. He had no further record.

Exhibit 50 is a file on a sale to William Thomas Horner. The contract date is August 12, 1948 when the balance was $8150.00. He had no further record on it.

Exhibit 51 is a file on a sale to Eugene Lippa. The contract balance as of June 24, 1948 was $8650.00. He had no further record on it.

Cross Examination

He did not know whether at the end of 1948 there was anything due McDonald on these four sales.

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LYLE D. DICKSON, called as a witness by plaintiff, testified as follows:

Direct Examination

I am Secretary to the Western Savings and Loan Company and a Certified Public Accountant. I have known McDonald for a long time and have also done work for him. In the spring of 1952 McDonald came to me and asked me to set up some books for him on his business. I set up the books and records for a corporation named McDonald Brothers, Incorporated which was formed at that time. The incorporators were Joseph S. McDonald, his brother Stevenson and their wives. In setting up the books I think we made a journal entry and made ledger books and journal books for the corporation which were kept by Mrs. McDonald.

91] I prepared the schedules of which defendant's Exhibit "E" are photostats. Schedule "A" a part of that exhibit, is a statement of property sales from January 1, 1952 to June 30, 1952. The source of information in preparing Schedule "A" was the receipts and dispersement ledger kept by Mrs. McDonald and copies of the sales statements from the realty companies. I had access to these records. The information was furnished by Mr. McDonald. On this schedule the sale to Tracy Mero shows the sale price was $18,750.00. As near as I can remember, we must have got it from the sales statements. That is where I got all of them from. The cost of sale is shown as $15,937.50. Earl Staten went around and asked different contractors what their rate of profit was which they estimated about 15%, and we figuted the cost with a 15% profit; that is, we deducted 15% of the sale price to get the cost. The notation at the bottom of Schedule "A" so indicates

Q. And then you have a further notation, "and work and labor 10 per cent." A. Yes, on work and labor contracts where he is doing it for someone else, where there was no sales commission, we figured it at 10 per cent. The 5 per cent would represent the sales commission.

I did not prepare a complete list of checks for the first six months of 1952. There is a journal prepared by

Mrs. McDonald which shows the complete break-down of that, which is a reconstruction of the receipts and disbursement record at that time.

Plaintiff's Exhibit 52 is a photostat of a document, the original of which I prepared. The exhibit was received into evidence. The document is an analysis of just those items that go into the work and progress, or to the items that were charged in these for building costs, and so forth for January, 1952. I don't think it was ever a complete list. It was made to test Mrs. McDonald's work and so I would know the character of the things that were going in here.

Q. What was the source, Mr. Dickson, of the information that you included in Government's Exhibit 52?

92]

A. The exact source, as I told you before, it come from that reconstruction of that receipts and disbursements record that we made for the first six months of 1952. Mrs. McDonald prepared, under my direction -- I made the spread sheets and how to do it, and she put down the information, and then I made certain analyses, certain tests, to check the accuracy of that, at the request of Mr. Staten, after Mr. Spillsbury had come in. I presented these papers to Mr. Staten. The figures in Exhibit 52 include payments of construction costs that were paid by McDonald during the first month of 1952. I do not know if they indicate accounts McDonald had due and payable at the end of 1951.

With reference to the cost of construction used in the schedule on the house sold to Tracy Mero, the reason why I didn't compute the actual cost rather than using the 15% figure was because the actual cost was something that I couldn't determine. I had no inventories in 1951. The only inventory I had was the beginning of July, 1952. I had no way of determining just what went into construction except to rely on inventory -- to rely on McDonald. That would have been the only thing I could have done.

Q. Were all of Mr. McDonald's records made available to you? A. Well, as far as I know. I don't know as he had any records in connection with the inventories in 1951; at least, I didn't see them.

Q. Well, you have heard referred to here, have you not, Mr. Dickson, the use of the phrase "receipts and

disbursements books of the defendant"; were those books made available to you? A. Yes, sir, for 1952 and 1951 they were.

Q. For 1952 and 1951? A. Yes, sir.

Q. Were they made available to you for any prior years? A. I never went through for any prior years. I don't know if I was denied the use of them, but I never went through those for any prior years.

93] We also used the 15 per cent figure on my computations for the year 1951 for the same reason and Mr. Spillsbury was informed exactly how we figured it at the time.

Cross Examination

I couldn't determine the actual cost of constructing the houses because I had no inventories, that is, of materials, houses and everything else.

I did go through the 1951 and 1952 receipts and disbursement records. When McDonald first came to me in the forepart of 1952, I told him after some discussion that his prior returns that he had filed had been incorrectly prepared.

Q. (By Mr. Croft) He told you at that time, didn't he, that he wanted to get his returns straightened out for prior years, and you told him that it would be necessary to reconstruct all of the sales that he had made and try to determine what the costs of the houses were?

A. Yes, sir.

Mr. Day: Your Honor, I believe this is outside the scope of direct examination of this witness. If Mr. Croft desires to make him his witness, I have no objection.

Mr. Croft: I think he testified on direct that he talked to Mr. McDonald --

Mr. Day: I believe not with regard to preparing returns or amending returns. Maybe I am in error. I don't believe I asked him about that.

The Court: I believe that is right. He didn't talk

about the returns, did he?

Mr. Croft: For those questions, then, I would, if necessary, make him my witness.

The Court: Well, you can go outside the direct examination, but, if you do, he is your witness. It is simply a question whether you make him your witness now or whether you make him your witness when you are putting your case on. I will permit you to make him your witness now if you want to, so this is not cross-examination.

94] Mr. Croft: I have no further questions along the line I just asked him, your Honor.

The Court: All right.

I did testify yesterday that before the investigation was commenced by Mr. Spillsbury, Mrs. McDonald and I had commenced work on a reconstruction of receipts and disbursements. We first began on the first half of 1952 because on July 1, 1952 a corporation was formed and all of the assets of McDonald and his brother Steve were transferred to the corporation. We wanted to reconstruct the first half of 1952 first and then go back to prior years. As near as I can remember, Mrs. McDonald had substantially completed her reconstruction of receipts and disbursements for the first part of 1952 before Spillsbury came into the picture.

Defendant's Exhibit "T" is Mrs. McDonald's reconstruction of receipts for the first half of 1952 that she was working on before Spillsbury began his investigation. Defendant's Exhibit "U" is the record she made up of disbursements for the first half of 1952. Both exhibits were prepared by Mrs. McDonald from the receipts and disbursements book that she kept over the years. On voir dire the witness stated he knew these records were prepared by Mrs. McDonald because he was present when she did considerable of his work and he rechecked her work after. His check marks are on some of the pages. He checked them against the original record books that have been referred to. Exhibits "T" and "U" were received into evidence.

Q. (By Mr. Croft) Now, those receipts and disbursements records which she made up contain exactly the same information as was in her receipts and disbursements book that she kept over the years, with the additional breakdown that she made to show what the checks were used for and where the receipts that she received came from is, that not so? A. And, in addition, the sales.

Q. The sales. Do you know whether or not these records were turned over to Agent Spillsbury?

I turned these over to Mr. Staten.

95] Defendant's Exhibit "V" is a schedule I prepared at the time the corporation was formed and is a statement of the assets that were transferred to the corporation. Exhibit "V" was received into evidence. The second item in the schedule shows a transfer to the corporation of $1805.37 from savings accounts. Those were the savings accounts that were required to be set up by State Savings and Prudential in connection with loans made to McDonald.

I worked with Mrs. McDonald for many evenings at her home in trying to reconstruct records for 1952 and 1951. I was present on two occasions when Spillsbury had a conversation with McDonald. I recall that McDonald told Spillsbury that he never used any money from the business account that wasn't included in reported income.

Mr. Croft: Now, for this question, your Honor, I would like to make him my own witness.

Q. (By Mr. Croft) Did you ask Mr. McDonald why he listed on his returns the various sources of compensation that were shown on his returns? A. I asked him particularly on where he had listed his compensation.

The Court: Well, I wonder--This is not in the presence of anyone from the United States. Do you have any objection?

Mr. Day: I do, your Honor. Certainly it would be self-serving as far as the defendant is concerned.

The Court: Surely. Here is a man talking to a certified public accountant, telling him something in the

absence of anybody from the other side. That is not admissible in evidence.

Mr. Croft: I can't refer to the case, your Honor, but in my research on the problem I do recall that cases have held that independent conversations out of the presence of Government employees or agents in which the defendant makes statements about what his state of mind was were admissible.

Th Court: You would have to show me the case on that. That is contrary to the whole law of evidence.

Mr. Croft: Well, perhaps I can come back to that later then.

I think that is all, your Honor.

96] Redirect Examination

I was consulted early in 1952 about setting up corporate books and records. I was not employed as a tax consultant. I made the corporate income tax returns from 1952 on. I did not prepare his personal return for 1952. I was not consulted in regard to its preparation, nor the preparation of the 1951 return. I didn't know about its preparation. I wasn't even employed. I never did do anything about amending McDonald's personal return for 1952, but we had done some work about reconstructing and getting ready to report it. In fact, we intended to report it at the time it was due, but it wasn't ready. At the time Spillsbury came in we had done nothing about filing an amended 1952 return.

In regard to the reconstruction work that was done, some of it was done before and some after McDonald's 1952 return was filed.

With respect to my telling McDonald his returns were incorrectly prepared, I did not see his returns. He told me how he had prepared them when I first talked to him. As near as I can remember this was around May or June of 1952. At that time I told him that his method of preparation of income tax returns was incorrect. Again,

after the corporation was set up, he brought up the question about prior years later on. I don't recall exactly, but I imagine it was probably the early part of 1953. I am not sure if it was before or after the 1952 return was filed.

The figure of $8,000.00 in Exhibit "V" for inventory of building material was furnished by McDonald. I think he had some working papers on that and was his estimate of what he had on hand. The figure of $257,150.00 for lots and homes under construction was furnished by McDonald. I told him as near as he could to prepare the inventory of what he had and on the basis of cost. I did not assist him in determining that figure.

The figure of $6,790.00 for accumulated depreciation I probably figured that myself. They are chiefly trucks and automobiles. I believe McDonald furnished the original cost at the time they were bought.

The figure on cash in the bank was the actual cash on hand. McDonald furnished the list of savings accounts he had in the various institutions and I merely added up the list.

97] The accounts receivable figure of $10,000.00 was furnished by McDonald. I think it was an estimate. On the notes and contracts receivable, a list of those on hand was prepared and submitted to the corporation.

With respect to liabilities, the accounts payable figure of $20,000.00 is, I believe, what he estimated he owed on current bills, which were paid one month later. The notes payable of $27,530.47 were actually notes that he had totaled up and furnished a list of. The mortgages payable figure of $129,500.00 was from figures he furnished from his records or records of lending institutions. All the figures on the exhibit except depreciation were furnished by McDonald.

With regard to McDonald's personal income tax return for 1952, I don't remember whether he asked me about it, but I do know that I didn't assist him in any way with the figures or anything about it. I don't know if he used the reconstruction work that we have talked about.

I did not actually go out and examine any of the houses under construction for the list of assets. I did not use the 15% figure as used in computing the cost in the Mero home in the preparation of Exhibit "V", nor did I do any computing of costs or profits in its preparation.

Re-cross Examination

I am regularly employed by Western Loan and the work I was able to do for the McDonald's I did on my time off.

Defendant's Exhibit "W" is a computation of the tax due for the first half of 1952 that I made for Earl Staten at the request of Agent Spillsbury. It was prepared after the 1952 return was filed. Exhibit "X" is a list of contracts receivable furnished by McDonald. Exhibit "Y" is a list of notes receivable furnished by McDonald. The amounts for the totals of those two items are the ones used in Exhibit "V". Exhibits "W", "X" and "Y" were received into evidence.

Redirect Examination

Exhibits "X" and "Y" were prepared by McDonald. I prepared Exhibit "W" and it is a computation of tax I made at the request of Earl Staten for Spillsbury from the reconstruction of the records for the first half of 1952. We prepared it from the original reconstructed records.

98] The Court: Find out what he means by "reconstructed records".

Q. (By Mr. Day) What do you mean by "reconstructed records"? A. Well, the only records obtained that was kept by Mrs. McDonald was in a book -- I guess they are here in evidence -- where they wrote down each transaction day by day as it occurred. There was no distribution as to assets, as to cash. In other words, it would be impossible to take a profit and loss statement or a proper accounting record from those records, so it was necessary to go through those transactions, reconstruct the sales and take all the transactions she had in those books and put them in proper form so it could be summarized in an accounting statement prepared therefrom.

Q. Is that the work that Mrs. McDonald was talking

about doing, or is that the work that you did? A. She actually went ahead and done the detailed work, and I checked it and prepared the entries on the sales.

Q. From your present knowledge, Mr. Dickson, of these matters would you say that this computation of tax for the year 1952 was a fair and proper statement?

A. That is a fair and proper statement, with the limitations we told you yesterday of how profit was figured on those sales.

Q. That was on an estimated basis? A. The inventories were on an estimated basis. The gross profit on sales was estimated.

No reconstruction was done for 1949 and 1950. After Agent Spillsbury came in, we did reconstruct 1951. I don't remember doing any before he came in.

Re-cross Examination

In connection with the reconstruction of sales, the record books which Mrs. McDonald kept showed receipts from each individual that she received money from, as well as receipts of loans received from the loaning institutions. I had available in the McDonald residence files on the sale of each house made during the years in question.

Q. (By Mr. Croft) When you say "reconstructed the sales", Mr. Dickson --

99] The Court: Just tell us what you did.

Q. (Continuing) -- just tell us what you did. A. As I just told the jury and Mr. Day before, we took the receipts book and took each transaction out of there and analyzed it and put it in the proper accounting form so statements could be made, and for additional information, why, we had to go fo. statements on sales from the real estate brokers, and so forth, in order to finish reconstructing this.

What I mean by "reconstructing" is putting in the proper form of accounting so it could be used to prepare records with and statements.

Q. And to determine profits on sales? A. Right.

McDonald vs. United States of America

DANIEL M. SMITH, called as a witness by plaintiff, testified as follows:

Direct Examination

I am a Special Agent with the Intelligence Division of the Internal Revenue Service. It was stipulated that the witness qualified as an expert accountant. I was assigned to investigate the income tax returns of Joseph S. McDonald in February, 1955. I did not have any contact with McDonald. I have had many contacts with his attorneys. The first I recall was on March 4, 1955 with Mr. Staten and Mr. Tibbals. I told them I had been asked to assist on the case, told them I was with the Intelligence Division, and told them I would like to examine McDonald's records and talk to him. They declined at that time to produce records or to allow me to talk to McDonald. I have had many brief contacts with them and been in their office many times. I asked them if they would give me records of these contracts which McDonald had transferred to the corporation. On May 23, 1955 they gave me photostatic copies of many of the contracts and notes and photostatic copies of part of the records of the collections. The photostats had been deleted in such a way as to take off all that which related to the period before the corporation was formed. That would have been prior to July, 1952. Photostats were furnished for the period after that, which served my purpose for the period after but not for the period before. That conversation was with Mr. Croft.

100] On August 4, 1955, I again directly specifically requested an opportunity to talk to McDonald and to examine his records and again I was denied. That request was directed to Mr. Croft and I believe Mr. Staten. I had other contacts as time went on. I haven't got a note of each and every time I talked about some minor matter. The next time I discussed the matter at length was on September 13, 1955 at which time McDonald was present. That was the first time I had met him. That was in our office and those present were McDonald, Croft, Staten, Tibbals, myself and Higginbotham, chief of the Intelligence Division. There was considerable said about their position in the case. McDonald did not say anything pertinent to the matter that I recall. At this time

they brought a record with them. They stated they did not wish this to be construed that they were waiving their Constitutional rights against self-incrimination and we, therefore, did not attempt to interview McDonald or examine his books, except for certain items that they showed us.

I met them a few months la er in Mr. Tonjes' office and I don't believe there was anything said at that conversation about the production of the books. They explained their position in the case to Tonjes. I do not recall that McDonald entered into the conversation to any particular extent. He did say a few things.

We started to determine the best way of arriving at his income from third-party evidence. He was in the real estate business -- our first job was to account for all of his real estate -- what he owned, what he bought, what he sold and what he had left. I determined that he sold 24 houses in 1949, 29 in 1950 and 29 in 1951 or about those numbers. We examined the county records, bank records, mortage loa records and tried to reconcile everything we had with the county records. We also found certain financial statements he had filed at lending institutions, which gave us a starting point and a basis for net worth statements at certain dates.

I did determine the net worth of the defendant at the beginning of our period, January 1, 1949. I also examined the records of many of McDonald's customers and the real estate firms with which he did business, primarily the places he sold his houses.

101] Because of the lack of records to work from, at some times there is some computation made; the exact figure is not always right there, but there is a basis for it.

At the first of 1949 I found there was a balance in the business account of $2,012.57 and in the personal account of $136.16. They are shown on the First Security Bank records.

I did not reduce these balances by outstanding checks as I had no way of doing so without the checks -- Well, there is a way of doing it, but I did not have the checks and it

would have increased the income had I reduced these balances. I tried to take, in every instance, the position most beneficial to Mr. McDonald. If there was any question as to what the figure was, I took the figure that was to his advantage so as to arrive at a minimum income.

There was a balance in the savings share account at the State Savings and Loan of $462.80. That account was in Mr. Joseph McDonald and Mr. Stevenson McDonald's names, so I have included one-half of it as being the asset of Joseph McDonald.

There was, on the first of 1949, due from the American Housing Company on a 1948 sale two checks, which totaled $3,771.65, one of these checks, dated December 30, which had not been deposited. We don't know if it had been received by Mr. McDonald, but it had not been deposited by him at the beginning of the year. The other check was not dated until the next year. They were due at the beginning of the year on a sale the prior year, so I gave him credit for those.

With respect to building materials, I relied on the financial statements filed by Mr. McDonald. One was filed with the FHA on January 18, 1949 and another was filed with the First Security Bank on March 17, 1949 -- I should say they were dated on those days; I don't know exactly what date the FHA got them, I don't believe.

The statements will show --

Q. The statements in evidence? A. The statements in evidence. They are in Exhibit 20 and Exhibit 35.

102] I will refer to those statements many times, Mr. Day. It might speed up a little if I had them. Both of these statements show -- one of them shows lumber and hardware $2,000; and othe other shows construction materials of $2,000.

Now, these statements are not right on January 1, 1949, but they are as near to that date as I could find any information.

Now, with respect to the stock in the Holladay

Lumber Company -- or the Holladay Water Company and the Big Cottonwood Upper Canal, I have used the number of shares -- I have used the number of shares owned by Mr. McDonald and his sister and brother as has been stipulated to. I considered that Mr. McDonald had one-half interest in those shares owned jointly, and I valued these shares at $100 a share with respect to the Upper Canal stock and $150 a share on the Holladay Water stock. These are the values used by Mr. McDonald in his financial statements filed at that time, at the beginning of the period. I used these same values at the end of the period also and there were only a few shares sold off, so it would make little difference in the income.

We attempted to find the actual cost, but we found it was many years ago.

I found he owned a 1947 Oldsmobile car. On his January 18 statement he valued the automobile at $1800; on his March 17, 1949 statement he lists a 1947 Oldsmobile at $1,000.

I gave him the greater amount, which is to his advantage, $1800, as the value of that car.

With respect to construction equipment, again I used the values on his statement, which is $3,000 on January 18, 1949. Now, that is listed as office furniture and equipment, but there is no place on there for building equipment, and I assumed that he was referring to building equipment, as I had no reason to believe he had that much in office furniture. In any event, I found he owned only a 1942 Chevrolet truck. We made extensive inquiries at the places around town who sold building equipment and the only thing we could find he owned was a Fordson tractor besides this truck. So it appeared that the $3,000 was as much as he owned.

103] On notes receivable at the beginning he lists on the March 17 statement a note from a Mr. W. C. Peterson, I believe, for $2400. I was unable to verify that he did have this note at the beginning of the year, but I gave him the benefit of the date and said that he did.

In order to ascertain if he had other notes -- I did

not have his records to determine; if I had, I could have looked at the payments received or I could have looked at the notes, but I went to the two real estate firms where he sold many of his houses, I believe the bulk of his houses, in 1948, and that was the Thayne and the Brockbank firms. I examined their files on all of the sales in 1948 and I failed to find any sales that showed that there were side notes on them.

With respect to contracts receivable I found — I believe I stated that note was $2400, is what I allowed. On the contracts receivable I found there were $140,861.24. Now, that figure is based -- first it was established that Mr. McDonald owned the property through the county records. I know that the house must have been sold before the beginning of 1949 as all the sales after that have been stipulated to.

Then the amounts due to him under these contracts were determined either from the contracts themselves which I found in the real estate companies' office, Thayne and Brockbank, which have been brought into evidence --

Mr. Croft: Are they in evidence now?

The Witness: Yes, we put the Brockbank and Thayne files in evidence, which contain, I believe, in every instance, a copy of the contract. If not, they contain a closing statement showing that part of the consideration was a contract.

Now, these were made at various times during 1948, most of them towards the end of the year, but some were early in the year and were probably reduced. They provided for regular monthly payments. I did not reduce them by any monthly payments as I didn't know the amount. I gave Mr. McDonald the benefit of the entire contract being due at the first of the year, which would have been, on the net worth basis, to his advantage.

104] I was able to determine the exact amount due Mr. McDonald on four of the contracts through the records of Prudential Federal, which are in evidence, and one of them through the records of Brockbank Realty. They were

collecting an account for him, and we have stipulated to that.

Now, with respect to several of them, I did not have an exact balance on January 1, 1949. I did have the balance on March -- at least a balance used on this March 17, 1949 statement. They are listed here on the statement. He shows a contract and the mortgage. I could tie these mortgages in exactly through the mortgage companies' records, except these are not the March 17 balance in every case. Sometimes they are an early date balance, but they are a balance sometime within a month or two, and it shows the contract; and when I could find no better information, I used that balance, increased by $100, to give allowance for the payments received in the months of January, February, and March.

In those cases where I had exact records I found that he used, with respect to a contract from M. E. Rasmussen, a balance of $9,651.97 as his March 17 balance. That was actually the balance at the beginning of the year, as evidenced by the Prudential records, and I found that in most instances that the balance that appears here, where I could verify it, was the balance at the beginning of the year; but, again, to give him credit of any possible doubt, I increased those balances where I did not have any other evidence by an amount of $100, and that was an amount of $140,861.24.

The Court: Suppose we take a brief recess.

Q. (By Mr. Day) Mr. Smith, I believe when we recessed you were discussing contracts receivable. Had you concluded your statement? A. One more statement on that. I found that three of these contracts were on property recorded jointly in the name of Stevenson McDonald and J. S. McDonald. I have allowed all of those as being the asset of J. S. McDonald at the beginning of the period, because I could not determine what the respective equities was, and that gives him the most benefit. That is the minimum position to take.

105] Q. I see. A. The next item is real estate, which I have valued at $68,955 at the beginning of 1949. Now, that consists of his home, which I have valued at $10,000, the same as he had on his March 17 financial statement, and that

is constant throughout the period; and a one-half interest in a small farm in Holladay, which I have valued at $13,000, as he did in a financial statement, and his half interest is worth $6,500. That was also constant throughout the years examined.

He also had six houses under construction. These are evidenced by the fact that he owned the lot and he had obtained construction loans and had drawn various amounts on these loans.

As has been stated, they complete so much work and then they can draw their mortgage money on it. It is, of course, impossible for me to go back now and say how much he paid for those houses, how near they were done.

In 1949, in applying for each of these loans, he said the lots cost $1,000 and the houses he estimated would cost $8,150 to build. I have used those as the cost of these houses. With regard to three of these houses, I have said they are completed at the beginning of the year. He did not have all of his mortgage money, but he did have about 70 per cent of it. So, in order to give him the maximum benefit, I said he had those houses all done.

With regard to the other three houses, he had drawn only 50 per cent of his mortgage money at the beginning of 1949, and I said those houses were 90 per cent completed, that there was only 10 per cent yet to be done. That gives me a value of $9,150, $8,235 on the 90 per cent completed houses. You have got to consider the value of the lot as $1,000 in figuring that 90 per cent. That gives all of his assets at the beginning of 1948, a total of $239,368.02.

Q. You said 1948. A. I mean at the beginning of 1949.

106] Now, he had mortgage loans of $129,478.13. They are at Prudential Insurance, Prudential Federal Building and Loan, Zions Savings, State Savings and Tracy-Collins.

Q. You said Prudential Federal Building and Loan; it is Prudential Federal Savings and Loan? A. That is correct, Prudential Federal Savings and Loan. I have found a mortgage on every piece of property in which he had a contract and which he still had with the exception of one. That is the contract from G. A. Buckmiller, so I have — in determining I had all of his liabilities, both at the

beginning and end. I searched the county records and found a liability on every piece of property except this one instance and reconciled them with it. I examined the records of all of these various companies to make sure that was all.

With respect to accounts payable allowed -- I have at the beginning of the period -- Actually, I have considered a $2,000 accounts payable of January 1, 1949. I have based that on the financial statements again.

The Court: Go ahead.

A. (Continuing) The accounts payable at the beginning of 1949 -- on this January 18, 1949 statement he shows accounts payable of $11,500, and on the March 17 statement he shows $2,000. Now, I have used the $2,000. To have used the $11,500 would have increased Mr. McDonald's income that I have computed by an additional $9,500.

Now, regardless of the fact I had his statement, this statement that it was $11,500, I didn't think, without some verification, that we could support that amount of money, so I reduced it in order to give him the maximum benefit. I used the figure he used himself a few months later.

On the net worth computation the greater the liability at the beginning of the period, the greater the income will be.

The only other liability which I found was a note payable to the First Security Bank of $1500, which is in evidence. That is total liabilities of $132,978.13. Subtracting the liabilities from the assets gives a net worth of $102,389.89.

107] Q. That was as of January 1, 1949, Mr. Smith?

A. That is correct.

Q. Now, did you determine the net worth of Mr. McDonald as of the end of our period, which would be December 31, 1951? A. Yes, I did.

Q. Now, in doing that, Mr. Smith, did you use the same system and basis for your determination as you did at the beginning of the period, that is, January 1, 1949?

A. With respect to the same assets I used the same basis. At the beginning of the period, if there was a doubt

as to valuation, I allowed the maximum value I could arrive at. At the end of the period I figured the minimum value, so as to arrive at what I believed to be the most conservative income we could compute from this evidence.

Q. In using that basis, that is, the maximum value at the beginning of the period and the minimum value at the end of the period, were those bases or computations for Mr. McDonald's benefit? A. That is right. (Continuing). The balance in the McDonald Bros., the business checking account, according to the bank statement is $4,235.64. I have reduced that by the total of the checks charged to this account during the first four days of January and come to an adjusted balance of $1,564.43. I have done this because I wanted to give allowance for outstanding checks and did not have the checks themselves to do so.

With respect to this item, there is some question as to whether this Stevenson McDonald has an interest in this account. I have considered it as being J. S. McDonald's account because I have a reduction in balance over the period and it is to his advantage to do it that way.

The personal account had a balance of $207.20.

108] The State Savings and Loan, one half of the balance in the State Savings and Loan share account was $289.96. The balance in the Western Loan and Building account was $776.41. The balance in the Prudential Federal account was $388.39. The building materials he shows on his financial statement at the end of 1951, building materials, stock pile, $10,250. I have used the figure of $5,000, less than half that amount. I have done that because an item like that, very often people have to estimate, and he may have estimated high. I have cut the figure he used right in half. Well, I have cut it less than half.

The Holladay Water stock I valued exactly as I did at the beginning of the period; the same with the Big Cottonwood Upper Canal water stock.

At the end of the period it has been stipulated he still had the 1947 Oldsmobile, which I have considered to have no —

Q. Mr. Smith, before you get onto the automobiles,

what was the value you gave to the water stock, both in Holladay Water Company and Upper Canal Irrigation Company?

The Court: He told you that he had the same value at the beginning as he had at the end.

Mr. Day: I believe he stated he used the same basis.

A. Oh, the figures -- I used the same basis of 100 and 150 dollars a share, the total amount of $5,175 for the Holladay stock, $4,000 for the Upper Canal stock.

Q. That is within a few hundred dollars less than the figures you had at the beginning of the period?

A. That is correct. The automobiles -- I do not know if these cars were used for business use or personal use. To give him the maximum benefit I have said they were cars for business use. The '47 Oldsmobile was then four years old, so I said it had no remaining value. The 1948 Oldsmobile which he took in on the sale of a house in December of 1949, as shown in the stipulation, for $2,150, I have considered two years depreciation at 33 1/3 per cent a year and come to a balance of $716.67.

Now, with respect to construction equipment, he had three International trucks which he bought during the period, which are in evidence. I used the cost of those trucks less depreciation on them, the depreciation figured on a five-year life.

109] It is in the stipulation that he allowed $4600 and assumed liabilities of $4,000 on a house sale for that tractor, so he had net equity in it of $600. I have considered only the $4,000 he actually paid out for the tractor. When he took it, he had to pay out $4,000 in order to get clear title to it, and I have depreciated that over a three-year life and arrived at an adjusted basis of something a little over $3,000. The total of the trucks depreciated and the construction equipment depreciated at the end of the period is $9,703.95.

The notes receivable at the end of the period total $34,219.31. There are a total of 25 notes with the balances shown in the first stipulation. They total $32,869.91. There was a balance on the G. A. Buckmiller note, as shown

in the second stipulation, and the L. Mark Richards note, which is shown on the financial statement given to the First Security Bank, to have an unpaid balance of $386.92.

I have included only one half of that amount in Mr. J. S. McDonald's net worth, as this note arose out of the sale of a piece of property they had owned jointly, and it is possible that a part of this note belonged to Stevenson. In this I found that only the farm and three lots, three contracts for the sale of houses from the farm property, were in Stevenson's name. Everything else I found in J. S. McDonald's name, and it has been stipulated that every sale during these years was in J. S. McDonald's name. The other sales I referred to were in prior years, and we had other contracts in these years.

A (Continuing) The contracts receivable total $262,538.71. They are — of these there are a total of 27 contracts; 22 of these, the contracts and the balances are in the first stipulation; three of the others, the balances are as shown by the records of Prudential Federal; and the other two, the balances are shown on this financial statement filed by Mr. McDonald with both the First Security Bank and FHA, and with some minor adjustments the balances we have determined and stipulated to are very consistent with the balances Mr. McDonald has used on this statement.

110] The ones which are not included in the stipulation, the reason is they were still balances due on these contracts he had at the beginning of the period. The existence of the contracts is verified by the fact that Mr. McDonald was the recorded owner of the property, as the county records show.

The real estate at the end of the period I have valued at $129,771.57. That includes the home which he still has and which I valued at the same $10,000; the half interest in the farm, which I again value at $6500; a vacant lot on Wilson Avenue, which has been stipulated as costing him $3,000; and a deposit made on the purchase of some lots on Lynwood, four lots on Lynwood Drive, I believe it is a $4,000 deposit. This was a deposit made

on a $15,000 contract. It included only the amount he had actually paid. That also has been stipulated to.

He also had made a deposit of $2,000 with Mr. Kenneth White toward the purchase of lots in East Morningside Heights. That is shown on a contract that is in evidence. Here again I have included only the deposit, not the full amount of the contract.

He also had a completed home at 3203 Kenton Drive. This house was mortgaged at Western Loan and Building Company and substantially all of the mortgage money had been drawn in 1951, and the witness testified, as I recall, that his showed — that from this fact he could state that this house was completed; that is, Western Loan and Building would not have paid out the mortgage money if the house hadn't been built. In valuing this house I have gone to the work done by Mr. Dickson in 1952. This house was sold to a Mr. Tracy Mero in 1952. It is shown on these papers Mr. Dickson prepared. It was sold for $18,500, I think — something over $18,000, and Mr. Dickson computed its cost at $15,937.50, and that is the cost I have used in this statement.

Now, he also bought all of these lots which were deeded to him by M. Kenneth White in Morningside Heights. He paid Kenneth White $19,500 for 26 lots. He also paid $24,011.35. He entered into this contract with Woodrow White. The net result was a payment of $900.91. He paid the First Security Title $1512.80. The total invested in those lots was $45,925.06 based on the payments actually made.

111] He was building houses on seven of these lots. They were financed at Prudential Federal. They were paying out the mortgage money on them, and we have the problem of arriving at how much he had invested in those lots.

The Court: In those houses.

The Witness: In these houses, yes, sir.

A. (Continuing) I arrived at an amount of $42,409.01. The way I did this is: I considered that he had spent the amount of the mortgage money drawn, including the mortgage money drawn January 8, 1952. I did not consider that he had

any money of his own in there, only the mortgage money drawn, but I did consider that he had an amount equal to that that he drew January 8, as the work must go on before they can pay out the money.

Also, on these mortgages, in addition to the lot he was building a house on, he pledged other lots, which the files show in most instances he was allowed $750 on each of these extra lots he pledged. Sometimes it was a different amount.

I did not consider he had spent that money in building these houses. That is, I reduced the money he had drawn first by the amount he had drawn on these extra lots and merely said he had spent the other mortgage money he drew, including that drawn January 8, as that was drawn to pay for work done previously.

Had I used the estimates of Mr. Mulcock as to his appraisal of what these houses would cost to build and his appraisal of the percentage of completion on January 8, 1952, I would have arrived at a value of $10,000 in excess of the one I have used. Again I have used the minimum figure.

I also went at it another way and that came even higher. I won't go into it.

112] That gives total real estate of $129,771.57 and the total assets of $454,351.60. He had mortgage loans of $246,761.39. I have found a mortgage against every piece of property of which he was recorded owner. I have accounted for every mortgage recorded in the county records in order to be sure I give him all of his debts. All of these mortgage records are in evidence except one small mortgage — that is, the mortgage records themselves are in evidence except one small mortgage to a life insurance company, which I was unable to get a balance from that Company, but the mortgage is listed on his financial statement. It would take me perhaps a moment to point to it. That one mortgage, I have used the balance he shows on his statement. Every other mortgage we have the records in evidence.

Accounts payable at the end of the period, on this statement Mr. McDonald says he owed $12,250. I wanted to be sure I gave him credit for everything he owed so I talked to some of his creditors, or we had some of our men talk to his creditors, and we found these three which are in evidence by stipulation. He owed three accounts totaling $7,256.67. I increased that amount by all of the checks he drew to pay for materials in the month of January, 1952, as shown by Mr. Dickson's papers. I didn't have the checks. So I allow him accounts payable of $18,333.87, $6,000 more than he shows he had. I have also allowed him payroll taxes due of $504.98, which are shown by the returns and checks that Mr. Huefner produced.

The notes payable at the First Security Bank at the end of 1951 totaled $9,993.20. There was a small liability at the Continental Bank of $85.55, and he owed Wayne Mason $1,400. That is a total liability of $277,079.32 and a net worth at the end of the period of $177,272.28.

Q. Mr. Smith, from these computations which you have made, what was your computation as to the increase in net worth in this three-year period? A. These result in an increase in net worth over the three years of $74,882.39.

Q. Would that figure of 74 thousand plus be in addition
113] to living expenses or other expenditures the defendant made for those purposes? A. Yes, this is just what he used to increase his wealth. It does not include anything he used to live on.

I could find no other source for this money except income to McDonald. My net worth figures are much lower than the figures shown on his financial statements, which show an increase in net worth over the three-year period of over $175,000.00, except the statement at the end of the year shows some assets of Stevenson McDonald, such as a half interest in the farm and a few things like that. On my computations the increase in net worth is $74,882.29. To this I added $4,477.64 which is the total of the personal deductions claimed on his income tax returns in these years, such as personal interest, personal taxes and contributions, which gives an adjusted gross income of $79,360.03. I have not included anything for personal living costs. His returns show he received certain amounts from Kenneth White, Rex Moss, Dennis Bowthorpe, L. H. Schofield, and Rex Sutherland.

These amounts total $5,695.00 for the three years and was for contract work he did. That leaves $73,665.03 which was profit from building and selling houses plus other income such as interest on the contract and notes.

Sales during these three years total $998,907.86. I prorated the net income of $73,000 in the exact relationship as the gross sales; 29.38% for 1949, and similarly for the other two years. If I had figured a 7.37457% profit on each house, I would have arrived at the same allocation of income. Based on this allocation of income, plus the income from contracts reported on the returns, the adjusted gross income for 1949 is $25,042.78, for 1950 is $28,071.44, and for 1951 is $26,245.81. The contract income was allocated as reported, not on the percentage basis. The proper tax for these three years, as I have computed it, was $4,655.32 for 1949, $5,991.62 for 1950 and for 1951, $5,786.46. I did prepare a statement of net worth and also as to computation of net income. The statements were marked as plaintiff's Exhibits 54 and 55 and were received in evidence.

114] Cross Examination

The financial statements in evidence showing a substantial increase in net worth over the years reflect that most of the assets were in land or contracts or notes receivable which were executed in connection with the sale of houses. The financial statement of December 31, 1951 also shows the farm owned by Joe and Steve McDonald as an asset. The ending net worth at the end of 1951 which I testified about was made up primarily of notes and contracts receivable from the sale of houses, land they had purchased or had owned for many years, water stock they had owned for many years and houses in the process of construction. Their bank balances in the savings accounts at the lending institutions and the checking account were relatively nominal. McDonald's personal bank account always carried just a nominal balance.

Q. You never found that he had acquired any stocks of bonds or built up any other assets other than in connection with the buying of land and building of houses and selling them? A. Not in any appreciable amount, no.

Q. When you began, or during the course of your

investigation, you started out to trace the disbursements made to Mr. McDonald from the lending institutions to see if you could determine whether or not he had used them for purposes that might help show that perhaps he was trying to evade taxes, didn't you? A. With respect to at least one of the institutions, yes, I traced the money that he borrowed.

Q. And in every instance you found that he had deposited those moneys into his bank account? A. That is correct, into the business bank account.

Q. Because you found that he always did so, you gave up searching along that line, didn't you?

A. Well, I wouldn't say I ever completely gave up. I didn't pursue that procedure very much, but I still continued to trace certain items; but I didn't follow that course of investigation to any great extent.

Q. Did you ever attempt to make an analysis of bank
115] deposits? A. No, I didn't.

In the net worth method of computing income if a house was sold, say, for $12,000.00 in 1951 and McDonald received a down payment of $500.00 and carried the balance on contract, the entire profit on the sale of the house would be taken into income in that year. In many cases all he received was a down payment and a contract for the balance, and the contract was one asset set up at the end of the period to show an increase in net worth. The down payments made are all shown in the stipulation.

My first contact in connection with this case was when Agent Gordon Christenson and I met with Mr. Staten and Allen Tibbals.

Q. And upon that occasion you recall, do you not, that Mr. Tibbals made the statement to you that, while he didn't know anything about the case and didn't know anything about Mr. McDonald's records or what they might show, since you were in the case and you were a special agent of the Intelligence Division, his advice to Mr. McDonald, without knowing anything about it at the time, would be not to turn any records over to you at that time? Do you recall Mr. Tibbals' making that statement? A. I don't recall Mr. Tibbals' making the statement. I recall the statement was made by one of them, something to that effect, yes.

Defendant's Exhibit "Z" is a receipt for records of McDonald Bros., Inc., which you (examining counsel) turned over to me on March 21, 1955. That has nothing to do with personal records. I requested the corporate records and they were turned over to me. Exhibit "Z" was received in evidence.

Exhibit "AA" was marked and shown to the witness. He stated he had seen the original in Agent Spillsbury's file but didn't know where he got it. Objection to the introduction of the exhibit was sustained.

I did call you (examining counsel) and asked you to furnish me with a break-down on the payables of the corporation and you did so. On that same occasion I asked you to get me information concerning depreciation on an Allis Chalmers tractor and you called me back and gave me the information.

116] On September 13 a conference was held in which you, Staten, Allen Tibbals, McDonald, Special Agent Higgenbotham and I were present.

Q. Upon that occasion you recall, do you not, that in presenting the material to you that I followed an outline that I had prepared? A. I recall that.

Q. Yes. Upon that occasion I will ask you whether or not we didn't furnish you with the following information: We stated, to begin with, that our failure, or the failure on the part of the taxpayer, the defendant Mr. McDonald, to cooperate with you by turning over records to you was on the advice of counsel pending a study of the records?

A. Yes.

Q. That was told to you, was it not? A. Yes, you made that statement on that day and on other occasions.

Q. You were also told, were you not, that our failure to make records available or to have Mr. McDonald interviewed by you at that time was not prompted by any secret knowledge on our part that he had anything to hide?

A. I believe something to that effect was said, yes.

Q. That, as I recall, was about the occasion where you were ready to forward the case for prosecution.

A. That is right.

Q. And upon that occasion you indicated to us that you had a deadline to meet and it was your desire to include

the year 1949 in the prosecution, if there was one?

A. That is right.

Q. We also told you upon that occasion, didn't we, that as lawyers representing Mr. McDonald we felt that we were under a greater obligation to know what the records showed --

Mr. Day: Your Honor -- Excuse me, Mr. Croft. I believe, in this regard, while it would be proper for Mr. Smith to testify with regard to incriminating statements made by the defendant or about him in his presence, that it is not incumbent upon the Government to present the Defendant's defense for him, if he has any, and these would be merely self-serving statements made to the agent and are improper.

117] Mr. Croft: Your Honor, they have raised the question of the failure to cooperate.

The Court: I understand.

Mr. Croft: I just want to point out --

The Court: I know what you are trying to point out, your questions indicate that; but they are self-serving questions. You are trying to rid yourself of the implication that there was any intentional concealment of information.

Mr. Croft: Right.

The Court: And concealment of books and records.

Mr. Croft: Right.

The Court: You are trying to prove that by your own statements made to a witness. There is no greater admissibility to those statements made over in your office to Mr. Smith than if you made them to me now. The objection is sustained.

Q. (By Mr. Croft) Upon the occasion of that conference we advised you what we had determined the records showed to the extent that we had been able to examine them

to date, did we not? A. Yes, you told us what you had found the records showed.

Q. Yes. A. In some statements to us.

Q. You were advised on that occasion that we had determined that all receipts showing the amount and the source and all disbursements made had been entered into the records? A. You said that. I believe you said there were some minor exceptions, but you said that in effect.

Q. We also advised you, did we not --

The Court: Well, now, this is the same sort of thing, isn't it?

Mr. Croft: Well, I think not, your Honor. It appears to me that advising him what our investigation to date disclosed and showing him what we had found to date in our study of the records certainly is admissible in showing the extent to which we did cooperate.

118] The Court: Well, you could cover that whole examination, then, by one question: Whether you did or did not cooperate with them in the investigation. Mr. Smith will tell you that in one answer.

Q. (By Mr. Croft) Upon the occasion of that conference we told you all that we had been able to determine from the records in our studies to date, didn't we?

A. You told me that, but you gave me no opportunity whatever to verify it.

Q. And on a subsequent occasion we had a similar conference with you and Mr. Tonjes on November 23, 1955, didn't we? A. I don't recall the date. I recall the conversation.

Q. And upon that occasion we also told you that we had made further studies of the records and, while we had not yet completed all three years, we gave you a summary of what we had found to date? A. Yes, there were some schedules presented to us at that time, and again we were given no opportunity whatever to verify it.

Q. Well, as a matter of fact, you didn't request an opportunity, did you? A. I had been refused access to these records on several occasions. This was conference in Mr. Tonjes' office which I was merely sitting in on.

Q. Mr. Smith, as a matter of fact, you never made

any request other than the one you testified to on August 4 directly to me to furnish any records to you, did you? A. That is not true, Mr. Croft, no. I asked you specifically for these contracts that were turned over to the corporation. You told me that you didn't think I was entitled to see the contracts so far as they applied to the individual, and you photostated them and deleted part of the record, so I saw only that that applied to the corporation.

Q. That was at the time you requested the corpora-
119] tion records? A. No, it was at the time I requested these contracts that were turned over to the corporation.

Q. At the time I turned those contracts over to you that related to the corporate records, I told you then that until I knew what Mr. McDonald's personal records showed, I wouldn't be in a position to advise him what to do, and until I could, I couldn't tell him to turn them over to you; I told you that, didn't I?

A. That is right, and as I recall, my reply was that I was accepting this as a refusal, I was taking this as refusal to produce the books; if you changed your mind, would you please let me know.

Q. As a matter of fact, you forwarded the case along in September of 1955, didn't you? A. Yes, the Statute of Limitations was rapidly running on the one year.

Q. And after that it was out of your hands?

A. Yes, it was out of my hands to a very large degree.

Q. Now, it is also true, is it not, Mr. Smith, that several days ago you and I sat down together and spent about three days working out the stipulation and schedules attached to the first stipulation? A. That is correct.

Q. And upon that occasion I furnished you details of every sale that went into that stipulation, didn't I?

A. No, sir, I don't believe that is entirely correct. You told me what you knew about it, and I told you what I knew about it and we got together.

Q. And other than for the year 1951 you really didn't have much information on the sales in the prior years, did you? In fact, the information in the schedules for the years 1949 and 1950, other than the identify of the purchases, was furnished almost entirely by me, wasn't it?

120] A. I didn't have all of the information on those earlier years' sales, no, as I told you then, I didn't have

the book.

Q. And with respect to the year 1951 you had more details on the sales made during those years, didn't you?

A. I had details on every sale made in 1951.

Q. But you didn't have the details concerning payments made on those sales? A. No, I did not. I had never seen the record where those payments were recorded.

Q. I showed you the details? A. You showed me each individual item as we came to it.

Q. I furnished the information about the details on the payment of each one of those sales in the stipulation?

A. Yes. This occurred less than a month ago.

Mr. Croft: Excuse me, your Honor.

I think that is all I have.

Redirect Examination

The stipulation entered into by the parties was after the indictment was returned by the Grand Jury.

Q. With regard to these conversations which were had with Mr. Croft, Mr. Staten, and Mr. Tibbals, of their office, where they did make certain statements to you, did they at that time or at any time during your investigation present these original record books to you so you could examine them? A. They did not. They on occasion looked up a specific item in them, but I don't recall of them doing that until the September conference. They looked up one or two items themselves at that conference.

Q. Aside from that, you were never permitted to see the books? A. No, not the books.

121] The Court: Where are the books?

Mr. Croft: Right here, your Honor. We intend to put them in.

Mr. Day: That is all, Mr. Smith.

The Court: Did you ever see the books of original entry?

The Witness: I have seen these books recently in working out these stipulations. I saw them first in the September conference, at which time they had them, but I was not allowed to examine them.

The Court: September of what year?

The Witness: 1955, last September.

Q. (By Mr. Day) Mr. Smith, in that regard, although you saw the books, you were never permitted to handle them or get any information out of them, were you? Have you ever been permitted to do that? A. Well, no, I have never handled the books. I have received a lot of information from them recently, but I have never, as I recall, had them in my possession to do as I wished with.

The Court: How did you get the information out of the books?

The Witness: A few instances where I have had to refer to their records I have had the accountant's work papers. And that is only in a few instances we have had to use something like that.

The Court: You haven't yourself, put your eye on the entries in those books up to this date?

The Witness: I have recently with respect to these things in the stipulation and some other items. They have shown me these payments are in these books, shown me the particular payments.

122] Q. (By Mr. Day) By that, Mr. Smith, do you mean the book itself was held out and you were shown, "Here is an entry in the book," and the book was again closed, is that not correct? A. Yes, that is about the way it was. They never made any attempt to cover up the rest of the page or anything, but they said, "Here are these payments," which we were writing to put in the stipulation. The same has been true with some other payments recently.

Recross-Examination

By Mr. Croft:

Q. In that regard, we were checking the entries in the books to verify, for your benefit, that they were made, weren't we? A. Well, no, we were checking -- the biggest reason I understood we were doing it was so that we could put as a matter of stipulation that these amounts were entered in the book.

Q. They were pointed out to you and the book closed because the only thing we were interested in at the time was the particular entry we were checking?

A. Yes, that is true. There was nothing secretive about it at the time.

Mr. Croft: That is all.

Mr. Day: That is all, Mr. Smith

(Witness excused.)

Mr. Day: The Government rests, your Honor.

Mr. Croft: Your Honor, at this time we would like to make our motion.

The Court: Ladies and gentlemen, will you retire to the jury room for a few minutes. Don't talk about the case.

(Jury retires.)

Mr. Croft: If the Court please, comes now the defendant Joseph S. McDonald and moves the Court to direct a verdict of acquittal for the reason that the Government has failed by its proof to prove beyond a reasonable doubt that the defendant wilfully attempted to defeat and evade his income taxes by filing a false return.

123] In support of my motion, your Honor, I would like to point out to you that the Government's evidence here on file is, of course, primarily designed to show the increase in net worth. We do not question that there was, and will

be, substantial tax due when the civil liability is settled, and as I indicated in my opening remarks to the jury, it is not a question of whether or not any tax is due or that the Government hasn't proven an increase in net worth that supports it.

The Court: I know. I know; you don't have to tell me that.

Mr. Croft: It is a lack of evidence of intent.

(Argument as to motion.)

The Court: No, I don't think I can grant your motion at this stage. I think the Government has made a prima facie case. The motion will be denied.

We will take a short recess.

(Recess had.)

The Court: Call in the jury.

Defendant's Case

Several Exhibits — "BB" through "KK" — were marked for identification.

EVELINE MAY McDONALD, called as a witness by defendant, testified as follows:

Direct Examination

I am the wife of the defendant. My name is signed May D. McDonald. During 1949, 1950 and 1951 my husband was engaged in building houses. He had been in that sort of work since 1924. I think he has built and sold houses during all of that time. During that time I kept a record of all the receipts and all disbursements that came into the company.

Defendant's Exhibit "II", consisting of two books, are the records of receipts and disbursements. The first book

starts with the year 1947 and goes through an entry of July 3, 1951. The entires of receipts and disbursements are continued in the second book. The first three entries in the second book are the same as the last three in the first book. The records were made as the receipts came in and the checks were written. Exhibit "II" was received into evidence.

124] Defendant's Exhibit "jj" are most of the cancelled checks and the check stubs on the McDonald Bros. account for the years 1949, 1950 and 1951. The stubs commence in December, 1948, and go through into 1952. (The exhibit did not include checks written and offered into evidence as separate exhibits). Exhibit "JJ" was received in evidence.

Q. (By Mr. Croft) Mrs. McDonald, I show you what has been marked Exhibit "hh" and ask you — which consists of two sections — and ask you if they are a record prepared by you showing receipts and disbursements for the year 1951. A. They are.

Q. And from what records did you prepare these two schedules? A. From the cash receipt and disbursement book.

Mr. Croft: We will offer Exhibit "HH".

Mr. Day: May I ask one or two questions on voir dire?

The Court: Yes.

Voir Dire Examination

By Mr. Day:

Q. Mrs. McDonald, when were these records prepared?

A. They were prepared sometime after, about — Well, they were taken from that record which was prepared when the books came in — I mean, when the moneys and the disbursements came in; and in order to compile a record and show what the disbursements were, I entered these onto those sheets.

Q. And when you are saying "these," you are referring to the record books identified as Defendant's Exhibit II?

A. That is right.

Q. When did you make the entries on these documents which I now hold in my hand and which are labeled Defendant's Exhibit HH? A. Well, I am not sure about the year.

Q. Could you approximate it for us? Was it recently or was it many years ago, or was it at about the same time you made up those records or was it at a later time?

A. It was at a later time, about nineteen fifty — sometime during 1952.

125] The Court: Was it after this CPA — What is his name?

Mr. Day: Mr. Lyle Dickson.

The Court: Well, ask about that.

Mr. Croft: Yes, I was just going to —

Mr. Day: Go ahead.

Direct Examination (Contd.)

By Mr. Croft:

Q. In the spring of 1952, Mrs. McDonald, did you and Mr. McDonald seek the help of Mr. Lyle Dickson?

A. Yes, sir.

Q. And after you made that contact and after consulting with him, did you then commence the work of preparing this detailed receipts and disbursements record?

A. Yes, sir.

Q. And did you do so at his request and instruction?

A. Yes, sir.

Q. And did you also do the same with respect to the first six months of 1952, which have already been received in evidence as Exhibit "T"? A. Yes, sir.

Q. And were these designed to show the nature of the receipts, and by that I mean moneys that were received on loans, moneys from contracts, moneys that came in on the sales of houses? A. I did.

Q. And were the disbursements records which you prepared made up to show the checks that went for the payment of wages and for materials and to subcontractors who did work for Mr. McDonald on houses, and other such expenses

as that? A. Yes, sir.

Mr. Croft: We will renew the offer.

The Court: They are not records of original entry?

126] Mr. Day: I believe that they are not, your Honor, and I believe that there is no indication that they had anything to do with the income tax returns or are material to that.

Q. (By Mr. Croft) Let me ask you this, Mrs. McDonald: Why were you preparing these records?

A. In an effort to determine what the proceeds we had gained from our business were.

Q. Did you do so because you learned in 1952 that income tax returns filed by Mr. McDonald in the past years had been erroneously prepared? A. I did.

Mr. Croft: Any further objection?

Mr. Day: I don't believe they are material, your Honor. I would like to make this objection, though: I believe Mr. Croft is testifying for his witness, and I suggest he let the witness testify.

The Court: Well, as far as these records are concerned, this is a recapitulation of material already in evidence. The material is not a book of original entry. The records offered are not records made at or about the time of the transaction. They are not made in the ordinary and regular course of business. The objection will be sustained.

Mr. Croft: Let me ask one further question in that connection, if you will, your Honor.

Q. (By Mr. Croft) Were these the records that you were working on when Agent Spillsbury came into the investigation? A. Yes.

Q. Or started the investigation? A. Yes, sir.

Q. Were they the records that you were making at the time that he came out to your home? A. Yes, sir.

Mr. Croft: I think it is material, your Honor, for the reason -- to show what they were doing at the time the agent started his investigation and why the records were not immediately turned over.

127] Let me ask one further question.

Q. (By Mr. Croft) Were these records that you made for 1951 and 1952 made available to Agent Spillsbury?
A. Yes, sir.
Q. Did he look at them and study them? A. He spent several days in my home.
Q. In going over these records? A. Yes, sir.
Q. Did he have access to the canceled checks, too?
A. He had access to anything that he desired.

Mr. Croft: We renew the offer, your Honor.

The Court: Objection sustained.

The 1949, 1950 and 1951 income tax returns of the defendant were all prepared in my hand writing. I did assist in the preparation of those returns.
Q. What did you do? A. We went through our book there and picked out the checks that were written to Mr. McDonald and added them up to find out what his income was.
Q. Now, when you say you went through the books, do you mean you went through the receipts and disbursements records that are in evidence as Exhibit II? A. That's right.
During 1949 - 1951 I did make out the checks on the business bank account to my husband. Exhibit "DD" are the checks I made out to my husband on the McDonald Bros. account during 1949, 1950 and 1951. Exhibit "DD" was received in evidence.

We had a personal bank account separate from the McDonald Bros. account at the First Security Bank at Sugarhouse. It was in the name of J. S. or May D. McDonald. The personal account was to take care of our home. Funds deposited to that account were checks Mr. McDonald received for the work that he considered his wages. Most of the checks are made out by me and bear my endorsement. His name is signed by me. After making them out, I deposited them directly

into the personal account at the Sugarhouse bank.

Q. And are those the checks which were totaled up
128] by you at the time you prepared the income tax returns? A. Well, there were some others that we had paid to Church organizations and a brother that we made a loan to on account of illness, and I don't recollect what all of them were.

The brother is E. L. Douglas. In the group of checks for 1950 (Exhibit "DD") is the check I referred to. I made it out to Mr. McDonald and it is endorsed over to E. L. Douglas. We did take that check into consideration in totaling up checks that were totaled to determine what we believed his income to be in 1950.

Exhibit "GG" are checks to the church that I think we took into consideration when we went through the record book. Exhibit "GG" was received in evidence.

Q. (By Mr. Croft) Can you explain why, Mrs. McDonald, when you prepared these income tax returns for those years, that you just took in and reported as income the checks that were withdrawn from the McDonald Bros. account?

A. To my knowledge, that is all — that is what was wages to me and I was reporting income, the income that we received.

Q. You mean you considered those checks that were withdrawn from the business as your income for that year?

A. That's right.

Q. Did you give any consideration to the houses that were sold in computing those? A. I hadn't thought — I didn't know and hadn't thought anything about the houses sold.

Defendant's Exhibit "FF" is a group of checks made payable to me or my husband, in small amounts, that were made out for stamps or something that was necessary in operating our accounts. It was received in evidence.

Exhibit "BB" consists of three checks drawn on our personal account. Exhibit "BB" was received in evidence. Referring to Exhibit "R", consisting of three deposit slips to McDonald Bros. account, and Exhibit "BB", the three checks in Exhibit "BB" were deposited in the McDonald Bros. account.

Q. Will you state why those three checks, one in each year, were made out by you and deposited in the McDonald Bros. account.

A. Because sometime some of the receipts that I received were in cash and I very likely was low on my bank deposit and I used the money and — until I was able to have a check from the McDonald Bros. to put on my personal account.

Q. Did you then write those checks to replace —

129] A. Yes, sir.

The Court: Now, Mr. Croft, I am going to have to let the witness testify.

A. (Continuing) They replaced the money I took that had come in to me from payments on notes and contracts that I had.

Q. Going back to your 1949 return, you show there Rex Moss as a source of funds, First Federal Savings, Kenneth White and Western Loan and Building. Can you tell us why those four were listed there as sources of funds.

A. Well, that is where the moneys came from that we obtained.

Q. What do you mean? A. Well, at the Western Loan — Let me look. At the Western Loan we had building loans there, and the First Federal Savings and Loan, we had building loans there. We had done work for Kenneth White and done work for Rex Moss.

Q. You had also done work for others, had you not?

A. We had done work for others. They weren't all included in this list.

Q. And, referring to the return for 1950, will you tell us why you listed those sources of funds on your return.

A. They were — these were the ones that came to mind when we made up the tax return.

In 1950 we were receiving loans from First Federal Savings and Loan and from Western Loan. In 1951 we did obtain loans from Western Loan and Prudential Federal Savings.

Exhibit "CC", identified as two checks, one to Douglas McDonald for $30.00 and the other to cash for stamps,

was received in evidence. Those two checks were not cashed. The handwriting "Douglas McDonald by May D. McDonald, cashed from Horner's payment", is my writing. As shown on page 82 of the first book of Exhibit "II", funds were received from William Horner of $55.00 and Alvin Thomas of $100.00. The bank statement for the month of August, 1949, shows a deposit of $120.00 on August 11, the date of receipt of the $155.00. Referring to the two checks in Exhibit "II", cash was paid to Douglas McDonald for work that he did and cash was used for stamps out of the Horner payment. Instead of putting the check through the bank, it was entered on the book and marked so it could be identified. The balance of the $20.00 from Horner went into the bank along with the deposit from Alvin Thomas.

130] Q. (By Mr. Croft) You mentioned, Mrs. McDonald, that when you prepared the income tax returns and listed certain sources of funds, there were other sources that were not listed. Will you tell us why just these were listed and others were not.

A. Well, those were the ones that came to mind, and to me the important thing was to list the amount of tax.

Q. Did you know, Mrs. McDonald, that when a house was sold, the sale of the house should have been reported on the income tax return? A. No, I didn't.

Cross Examination

I graduated from the eight grade. I was a comptometer operator for the Oregon Short Line Railroad for 10 years. I don't know how long I have kept the books for my husband, but I think it would be back to 1946. The returns were all in my handwriting. On the 1949 return, I cannot say how the amount of $2100.00 shown as receipts from Rex Moss was arrived at.

Q. Well, how did you arrive at the figure of $1850, which you list as received as another wage from First Federal Savings and Loan? A. Well, we estimated all of those so that it would come to the total amount of wages earned.

Q. Do you mean that the total amount of wages, that is, the $6735 figure that you have here as a total, was a figure you arrived at first? A. Yes, sir.

131] Q. And how did you arrive at that figure, then, the sum of $6735? A. We took the information from that receipts and disbursements book.

Q. When you went through these receipts and disbursements books, why did you pick out any individual amounts, Mrs. McDonald, if you did examine them, to make up this total of $6735? A. I added all of the checks up that I knew that we had received for our own sustenance.

Q. That is, that you put into the account in the name of J. S. and May D. McDonald? A. Yes, sir, and others — several others that weren't deposited. They weren't all deposited.

Q. I see. That is, you added — I believe you said to Mr. Croft — the checks that went to the church organizations and some others? A. That is right.

Q. I see. You didn't add in as income, Mrs. McDonald, though, any other of these items that came in to you, did you? A. What do you mean by that?

Q. Well, any items that were payments on these homes, down payments or payments on contracts. You didn't add in any of that did you? A. No, sir.

Interest payments were made on notes and contracts.

Q. Were any of those payments, that is, of interest, entered or included in these figures?

A. No, sir.

Q. Mrs. McDonald, calling your attention to Schedule "C", which is on the second sheet of the 1949 return, which is marked as Plaintiff's Exhibit 3, I direct your attention to what is called "Profit or Loss from Business or Profession."

Now, when you were making out this return, what if anything did you do about this Schedule C?

A. I didn't do anything about it. I didn't know

132] that I had to do anything about that.

Q. Well, directing your attention right here to "Nature of Business"; did you think anything about that?

A. No, sir.

Q. Directing your attention to "Total Receipts," that would be total receipts from business, wouldn't it?

A. I wouldn't know. I hadn't even considered total receipts on that sheet at all.

Q. You didn't pay any attention at all, then, to the profit-or-loss-from-business schedule in making out this return? A. No, sir, this return was made — in my mind this was my individual income tax return as wages, like

anyone else would receive wages. My husband was a carpenter, and he worked in the carpenter business, and this was the wages that we considered was his return from what we were doing. The signatures on the returns for 1949, 1950 and 1951 are my husband's.

The same thing would be true of the figure of $1300.00 received from Kenneth White, and of $1485.00 received from Western Loan and Building. That had no connection with actual payments from White or Western Loan.

The Court: Do those figures have any relation to anything or did you just pull them out of the air?

The Witness: They were the source that the moneys came from that we received.

The Court: Well, but you say they weren't wages; you put them in under wages, but they weren't wages.

The Witness: Well, to me that was wages, and we had to tell somewhere where the money came that we received, and I didn't have anywhere else that it came from.

The Court: Did the money actually come from Western Loan and Savings? Find that out.

Q. (By Mr. Day) Mrs. McDonald, did Western Loan and Building Company actually pay to Mr. McDonald any wages in this year? A. No, sir.

Q. They did not? A. No, sir.

133]

The Court: Did they pay him anything?

The Witness: We received construction loans from them. What we received from Western Loan and Building was money from loans. As far as I can tell that was the only money received from Western. I did keep all the books.

Q. Now, with regard to First Federal Savings and Loan, you indicate a total of wages paid of $1850. Did Mr. McDonald, your husband, receive any wages from First Federal Savings and Loan in the year 1949?

A. No, sir, not for wages. All of these items here

are sources where money that I received came from.

Q. I see. A. And we got that distributed -- I mean, we distributed in order to arrive at the total wages. I didn't have any way of telling how much the wages were from different banks and different places.

Q. Well, Mrs. McDonald, let's see if I understand you. You start out with a total figure that you used for living expenses? A. That is right.

Q. And donations to the Church and other personal expenses? A. That is right.

Q. That is the figure of $6735? A. That is right.

Q. And you state that you considered that as wages?

A. That is right.

Q. After you had that figure, you merely list some sources, what you thought were the sources of the wages?

A. That is right.

Q. And you picked some figures out of the air, I presume, and wrote down your total at $6735? A. That's right.

134] Q. With regard to Rex Moss and Kenneth White, who are the two individuals named here, did Mr. Rex Moss pay wages to your husband during this year 1949 of $2100?

A. I told you he didn't pay any wages on here. This was money that was received from people that he did work for.

Q. I see.

The Court: Well, he didn't pay that same amount, either, is that right?

The Witness: This amount here? I would have to look it up.

The Court: Well, I understood you to say you made a determination of how much your living expenses were and your donations, and one thing and another, and you came up with the $6700 figure, for instance, and then you set your hand to putting some figures down that would add up to that amount.

The Witness: That is right.

The Court: Where did you get those figures?

The Witness: I told you that we just estimated them.

The Court: That is to say, you just put figures down, any figures down that would add up to the $6700?

The Witness: That's right.

The Court: And then, in addition to that, you had gotten some loans from some of these people and so you put their names down as the place from which the money came?

The Witness: Loans--What do you mean by loans?

The Court: Well, the Western Savings and Loan, for instance.

The Witness: Well, that was a source of where Mr. McDonald's wages came from.

The Court: I thought you said he didn't get any wages.

The Witness: Well, the money that we had to live on was our wages, and it had to come from somewhere. The loans--when we take out a loan -- we have to pay men wages, in order to compute a loan. We paid other people wages from loans, and these are the sources of where the moneys came from.

135] The amount of the deductions listed on page 3 of the 1949 return I got from receipts or the checks I made out to those people. They were actual payments I made out. There wasn't any question about them. I didn't have to estimate or guess at them. Then on the basis of actual deductions plus personal living expenses the income tax return was made out and the tax computed.

With reference to the 1950 return, First Federal Savings and Loan did not pay $2500.00 in wages or any wages to my husband. This is the same thing. Dennis Bowthorpe paid money to my husband in 1950 for contract work he had done.

Q. Do you know whether or not Dennis Bowthorpe paid the sum of $1250, or was it an estimated figure?

A. That was all worked out in the same manner.

That is true of the figure of $3225.00 from Western

Loan. No wages from Western Loan were received. The amount was estimated. The total income of $6975.00 represented here was computed again by starting with personal living expenses, to which were added church and other contributions. That figure was not estimated or guessed at. But as to sources, the figures were assumed. The deductions listed on page 3 of the form were the actual items that we paid. We didn't estimate or guess at them. Those items, as I recall, were included in the $6975.00.

In regard to 1951, Western Loan and Building did not pay $4750.00 in wages to my husband. That is the same thing. We started with the figure here of $7135.00 and tried to show the sources where the money came from. We added up all personal items, living expenses, contributions, taxes and so on to arrive at a figure of $7135.00. Then to show where that came from we estimated an amount from Western Loan (termed by Mr. Day as wages).

Q. It is true, is it not, Mrs. McDonald, that the Western Loan and Building paid no wages to your husband in these years? A. That is right, if you term it wages. I am trying to explain to you that this is the source of where the money came from that we got our wages from.

Q. I see.

The Court: But there was never any sum received from -- take one of those for example.

Mr. Day: I will hand you this one, which is the one I was then talking about.

136] The Court: Let's take one of these: Prudential Federal Savings, $1340. You didn't get $1340, the sum of $1340, did you?

The Witness: No.

The Court: You never did get such a sum from the Prudential Savings?

The Witness: No.

The Court: And here is Western Loan and Building, $4750. You never did get such a sum?

The Witness: Not to Mr. McDonald for wages.

The Court: Well, for anything else?

The Witness: Well, he got a number of loans, and the wages -- this is the source of where the wages -- the money came from for his wages.

The Court: What I mean, Mrs. McDonald, is that at no time did they give you a check for $4750?

The Witness: For wages, no, because we weren't working for Western Loan.

The Court: This is the source of the money?

The Witness: That is the source of the money where the wages came from.

The Court: But, of course, Western Loan and Building let you have a bigger sum than that?

The Witness: Surely.

The Court: This $4750 doesn't represent any particular sum they ever paid you?

The Witness: No.

The same thing would be true of the items from L. H. Schofield of $430.00 and Rex Sutherland, $615.00. Those amounts were "picked out of the air". During 1951 Mr. McDonald did do contract work for a number of other individuals, including Lloyd Jackson who paid him in excess of $6000.00, and some of the other men who have testified or about whom we have stipulated. Those items were not included.

137] Q. Mrs. McDonald, just one comment or two about this occupation of carpenter. How did you come to write in there the word "carpenter" on each one of these three returns? A. Because that is what Mr. McDonald was engaged in, carpentry work, had been all his life.

With reference to the 1951 return, I did include a Schedule (C) of profit or loss from business or profession

and computation of self-employment tax. It is in my handwriting and also where I show my name and that of my husband as a joint return. In it I show nature of business as carpenter and I listed $7135.00 as total receipts from business and profession. That amount is the same figure previously added up as personal living expenses, plus "these other items we have been referring to". I gave no cost of goods sold or other business deductions and listed that as net profit. In the "Computation of Self-Employment Tax", I take the same amount and compute a self-employment tax of $81.00. I don't know that a self-employment tax was in the law in 1951 and not for preceding years. I wouldn't know why use of Schedule C was left entirely out of the 1949 and 1950 returns. I wouldn't know whether self-employment tax was by law permitted or included in Schedule C for those two prior years.

The difference between the account in the name of J. S. or May McDonald and the account in the name of McDonald Bros. is that "one of them was the money that came in for building of houses and other receipts on contracts, and the other one was the money that we took out of the business for our wages." The account in the name of J. S. or May McDonald was the account used exclusively for personal living expenses. The McDonald Bros. account was the business account which the business receipts and disbursements went into and came out of. I wrote practically all of the checks on that account and my husband wrote only a few of them.

Q. Now, Mrs. McDonald, I didn't quite understand with regard to the work that you stated you did on the books, that is, the books that are labeled II, or double I; in connection with the preparation of the income tax returns for these three years, other than merely going through them and picking out these check items -- is that all you did? A. That's right.

Q. That is all you did? A. To me that was my income.

138] Q. I see. Mrs. McDonald, just two or three more questions with regard to these items that you stated were the sources of your income. I am wondering why you didn't include a schedule or some indication that some of the source of your income was from the purchasers of

your homes. Did you consider doing that? A. I didn't.

Q. Did you discuss it with your husband?

A. I haven't any recollection of it.

Q. Do you have a recollection of not discussing it with your husband? A. I have a recollection of not discussing it. To us our income was the money that we received from the account that was placed in our personal account with a few exceptions we had a few things that weren't deposited in that bank account.

Q. Do I understand you, Mrs. McDonald, correctly, then, that you considered the income as the amounts that you took out of your business account? A. That's right.

Q. And what you left in your business account you didn't consider being income, is that correct?

A. No, sir, no, sir, I didn't have any other — there wasn't any income there. I had all I could do to try and keep the bills paid up.

Q. Well, now, Mrs. McDonald, with regard to the Lloyd Jackson contract, for example, for $6050, that is in evidence here, did you consider any part of that as income?

A. There were a number of others that we did work for that were not added on there. Those items that are on those income tax returns are the ones that came to our minds at the time that we were making our income tax up.

Q. Wouldn't Mr. Lloyd Jackson come to your mind as you went through your account books looking for these items?

139] A. We didn't go through looking for those items for sources of income. We went through the books and looked for the checks that were paid to Mr. J.S. McDonald.

Q. You looked for expense items rather than income items? A. That's correct.

Q. Is that correct? A. That's right.

Q. And in making out your income tax returns what you did was, you considered expenses rather than income, is that right? A. Expenses?

Q. Personal expenses. A I don't get — I considered the checks that were made to Mr. McDonald or myself as our income.

Q. Well — A. For work that he performed.

Q. Mrs. McDonald, then, if you had decided to buy a new stove for your kitchen and you wrote yourself a check for it out of the business account, would you have considered that as income, as an income item?

A. Yes, I would.

Q. Any item you used for personal expenses you considered as income? A. Yes, sir.

Q. You didn't consider it as an expense item?

A. I don't understand what you mean there.

The Court: Well, I think what he means is: the money you spent was income, but the money you saved was not.

The Witness: I didn't have any savings.

The Court: Well, you acquired a lot of property with it.

The Witness: All I had in our account was the money that we were living on.

140] With regard to the contracts on the sale of homes in 1949, 1950, 1951 and prior years, I personally kept track of most of the contracts and notes. Individuals buying these houses made their payments to me. When any one of the purchasers made a payment, I computed the interest at that time on both contracts and notes. In the preparation of income tax returns I did not consider that interest because all of those payments went into the one account, the working account. I had nothing to do with that.

Plaintiff's Exhibit 20, the financial statement of December 31, 1951 is in my handwriting. It shows total assets of $447,406.95, and total liabilities of $194,729.22, and a net worth of $252,677.73. I wrote it down and my husband must have helped me. His signature is on the statement. All entries are in my handwriting.

Q. Mrs. McDonald, where did you think that this net worth figure came from? A. What do you mean by "net worth"?

Q. Well, you have as net worth 252 thousand, a little over a quarter of a million dollars net worth there as the difference between your liabilities and your total assets; that is, you have 447 thousand some odd dollars as total assets and you have liabilities of 194 thousand, and a difference, which is your net worth. The difference between what you have and what you owe is your net worth. You have $252,677.73. Where did you think that came from?

A. Well, a lot of it came from ground that we had had for many years, in fact, before I came into the family, I

believe; we had ground that had increased in value and a lot of it came from that.

Q. That was this real estate that you listed as 68 thousand, is that correct, "Real Estate (See Schedule 3)"; would that be that figure over there, Schedule 3, Real Estate? A. I guess so.

Q. As a matter of fact, a very large proportion of it came, did it not, from real estate sold on contract, $233,000 worth? A. I guess so.

Q. Well, isn't it a fact? A. Well, but there is a
141] liability against that real estate sold on contract there, you see.

Q. Yes, of $162,000? A. That's right.

Q. Isn't it apparent to you, Mrs. McDonald, that there was a real, substantial net worth here that came from some place? A. Well, at that time, Mr. Day, I didn't know anything about bookkeeping. I had a cash receipt and disbursement book and it had — and net worth and those items didn't mean anything to me. I hadn't had any training; I knew nothing about it. To me my income was the money I received and paid out — my income was the wages that I took out and the money that I received for properties was put into that account, working account. I didn't know anything about these statements here.

My husband's signature is on the individual statement of March 17, 1949. I don't know who made it up or whether I did or not. On it a net worth of $73,883.56 is shown. The one in my handwriting of almost three years later shows a net worth of $252,000.00, but a lot of that was property and water stock that had increased in value from the time we purchased it.

Exhibit 35 (February 3, 1948) is in my handwriting. The signature is that of my husband. I have written my husband's business as "general contracting". The statement of December 31, 1951 to Western Loan shows the business as building contractor, but that isn't my writing. It is typewritten. It is a copy of the one given to the First Security Bank which is in my handwriting which also indicates the business as "building contractor". That was a requirement of the bank in order to obtain a loan.

My husband's signature appears on the form dated April

10, 1948. I don't recognize the writing on it. The name McDonald Bros. was a name my husband used to do business under.

Redirect Examination

With reference to the use of the name McDonald Bros., he did do business with his brother Stevenson McDonald. They have always worked together. Steve is a carpenter. They worked together building the houses. Stevenson received money on the working or business account of McDonald Bros.

142] The amount of the mortgage shown in the stipulation is the amount of money borrowed to build the particular house. During a year's time loans for the construction of houses exceeded well over $100,000.00 each year.

Q. Did all of the money that came to you for construction loans go into that business account?

A. All of the money that came at all went into that business account.

Money did come out of the business account and go into the personal account. Living expenses and church donations were paid out of the personal account.

Q. (By Mr. Croft) You have kept referring, during the course of your cross-examination, to "my income"; do you mean years personally or yours and your husband's?

A. I had no income. When I say "my income", I mean by husband's income.

Defendant's Exhibit "KK", identified as the files on the individual sale of houses during the three years in question, was received in evidence.

Recross Examination

Money received by Stevenson McDonald from the business account was for wages. I would think that I did report those to the government for social security for Stevenson. The papers in the files are papers pertaining to the sale. I do not know if the sale price is recorded in each. I don't know if the amortization sheets are included in the files. Amortization sheets are sheets that I kept track of the payments

of the loans on. I kept a separate file on the receipt of payments. The sheets do not have interest already figured and computed. I compute the interest. To arrive at the "real estate sold on contract" figure of $233,000 on the financial statement, I presume I went to those contracts to see and added them up. I would presume the same thing would be true on mortgages and real estate sold on contract for liabilities.

143] Mr. Croft: That is all.

I may state that the amortization sheets she spoke of are some of the documents I pulled out for the trial.

The Court: They are going to be returned?

Mr. Croft: Yes.

The Court: By an amortization sheet, all you mean is a sheet that shows a piece of real estate was sold for a certain amount of money, contract price, it shows the down payment and then proceeds month by month, or whatever the payment periods were, to show the amount paid and the allocation out of that amount of an interest figure and the allocation out of that amount of principal paid and that deducted from the balance, and a new balance?

Mr. Croft: Right.

The Court: That is what you mean, isn't it?

The Witness: Yes, sir.

The Court: Yes. All right.

Defendant's Exhibit "LL", a photostatic copy of records of the First Security Bank, Fourth South Branch, was received into evidence upon stipulation.

JOSEPH S. McDONALD testified as follows:

Direct Examination

I am 54 years old. I have had a high school education.

I am employed by McDonald Bros., Inc. I am a carpenter and builder. During 1949, 1950 and 1951 my brother Stevenson and I together were building houses for sale. We started to build houses for sale about 1941. Prior to that I was a carpenter and did my first carpenter work in 1924. My brother and I have worked together as carpenters all our lives. In 1947 he became actively engaged with me in the building business. We opened a bank account at the First Security Bank in Sugarhouse under the name McDonald Bros.

At that time we borrowed money on a farm that we had in Holladay. We needed some cash and borrowed to get started on the building operations. We acquired the farm in 1924. Since opening the account, all moneys that we borrowed from banks for construction and also money that came from the sale of houses and from subcontract work were deposited to the McDonald Bros. account. During those years, in addition to construction loans that we made on houses, we borrowed other moneys from banks to help finance houses and properties and the houses and lots that we were buying at the time.

144] In building a house construction costs normally exceed the amount that one can borrow from the bank.

The type of disbursements made from the McDonald Bros. account were for wages, building materials, subcontractors, lots and other things that were in the course of constructing houses houses and buying lots; also, payments on mortgages on our property.

I personally did withdraw funds from the McDonald Bros. account. That was done by a check to myself, usually monthly. Those checks were for our personal use and they were usually deposited to our personal account, which was at the same bank in the name of J.S. and May D. McDonald.

During the years 1949, 1950 and 1951, I did not know that when I built a house and sold it, I was required by law to make a report of that sale on my income tax return. The signature on my 1949 return is mine. In 1949 I did not receive money from, for work performed for, the First Federal Savings and Loan Association or Western Loan and

Building Association. In that year I borrowed many thousands of dollars from those institutions. In 1949 I did work for Rex Moss and Kenneth White.

Q. Now, when you prepared your 1949 income tax return -- you show a total income of $6735 -- will you tell us how you arrived at that figure. A. That figure represents money that we took out of the business for our own personal use.

Q. How was that amount determined when you prepared your return in that year? A. Mrs. McDonald and I went over the records, the receipt and disbursement record book that Mrs. McDonald kept, and took the numbers -- took the amounts that were paid to us for our personal use.

Q. And did you determine the total then?

A. Yes, we determined -- any amounts that were given for our personal use, we determined a total of that.

[R45] Upon one or two occasions I did obtain money from my wife that was collected on contracts that were not deposited in the McDonald Bros. account and this was reflected on the receipts and disbursement records kept by my wife.

Exhibit "DD" is a check dated April 2, 1949, made payable to me in the sum of $1500.00. Exhibit "LL" was a cashier's check made payable to me for $1500.00. I purchased the cashier's check with the $1500.00 check. I used the cashier's check to pay Mr. Scott of the Scott Investment Company for property we bought in Grandview Circle. My endorsement is on the back. I handled this transaction in this manner at the request of B. D. Scott. The check was used to purchase land. We did not take that into account in computing drawings from the McDonald Bros. accounts. That was a business check.

In 1949 I did sell a house to Leland Carlson. The down payment was a 1948 Oldsmobile car. I allowed him approximately $2200.00 on the car on the purchase price. We used that car for our family car.

Q. I will ask you, Mr. McDonald, if, when you computed your income there that you reported on your 1949 return, you took into consideration the fact that you had obtained

that car for about $2200 from Mr. Carlson and used it yourself for your own personal family use?

A. Yes, sir.

Q. Now, will you tell us why, Mr. McDonald, when you prepared the 1949 income tax return, you set out the income as having come from Rex Moss and Kenneth White and those two banks, the First Federal Savings and Western Loan, in that manner. Why did you show the two banks as sources of funds there on your return, as you did?

A. Those were sources of our income, the sources where we got our money from to pay our bills and pay wages and pay our business account. When we took money for ourselves, it was natural to give that as a source of our income.

146] Q. Now, with respect to the amount shown here from Rex Moss and Ken White, do you have any recollection as to why you chose the particular amounts shown on the return as having come from those two parties? Let's take Rex Moss. Do you have a recollection as to why you show $2100 from Rex? A. We did work that year for Rex Moss, mostly carpenter work on concrete work, forming and preparing for concrete work. A lot of that was work that my brother and I did, and it was natural that we should use his name also in preparing that; and that amount would represent what we made on that -- would really represent what we made on that job.

Q. Well, when you prepared this return, did you take into consideration what you thought you had made on that particular deal with Rex Moss in choosing that particular figure for use on your return? A. I don't remember on that exactly whether we did. It seems to me, as I recollect at the present time, that that is what we did. We used that because that was work that we had done, and it was work that we had done as carpenters on that particular job.

In 1949 I did subcontract work for Ken White. He did pay me more than $1300.00 shown on the return. I do not recall why we chose that particular amount.

Q. Can you tell us whether or not the figures shown from the Western Loan and First Federal Savings represent any particular amount, or is that an arbitrary adjustment to come up with the income that you thought you should report? A. When we figured what we thought our income was for the year, which in this case was $6735, we took some of the sources of our income to total $6735 in this

case of 1949.

Q. Now, of course, during 1949 you received other compensation from subcontract work, did you not?

In 1949 I did receive other compensation for subcontract work. The signature on the 1950 return is mine. In that year I did not receive any payment from, for work done for, the First Federal Savings and Loan Company or Western Loan. During that year I borrowed many thousands of dollars from both institutions. That year I did work for Dennis Bowthorpe. We remodeled a building for him. We furnished the labor and material in that building. I had an agreed price with him for what I would do the work for and that price included the cost of materials that I furnished. We figured we made about $1100.00 on that job.

Q. In 1950 when you were preparing your 1950 income tax return, which would be in the spring of 1951, you show income there of $6975. Can you tell us how you determined that figure? A. The same as we did on our 1949 and we went through our records and took the checks that were paid to Mrs. McDonald and J. S. McDonald for our living -- for our own account.

Q. Why did you just take those checks?

A. We thought that income to us was what we took out of the business.

Q. For personal use? A. For personal use.

147]

My signature and that of my wife appears on the 1951 income tax return. In that year I did not receive payment from, for work done for, either the Western Loan and Building Company or Prudential Federal Savings. In that year I borrowed many thousands of dollars from both companies. The money borrowed was construction loans. In 1951 I did work for L. H. Schofield and Rex Sutherland. The work for Schofield was a contract on part of his house that he was building. The amount received from him included the cost of labor and materials. The money Sutherland paid me that year included the cost of labor and materials.

Q. Do you have any recollection at this time why, when you prepared your 1951 income tax return, you chose those particular amounts for those two men, 430 in the case of Mr. Schofield and 615 in the case of Mr. Sutherland?

A. As I remember, we figured that was about what we

made on those particular jobs.

In 1951 I also received other moneys from other subcontract work that are not shown on the return.

The signature on Exhibit "C" is mine. I can't tell who prepared it. I furnished the information appearing on that document to whomever typed it up.

148] The applications for mortgage loans in Exhibit "S" were filed by me with the Prudential Insurance Company. The applications were made at American Housing, Incorporated. Defendant's Exhibit "MM" bears my signature. It is a copy of the fifth application, on 2732 Grandview Circle, which is included in Exhibit "S". Exhibit "MM" was received in evidence. The information appearing on the forms above my signature was furnished by me to the person who typed the applications.

Exhibit "AA" bears my signature. The original was delivered to Mr. Spillsbury at his request on or about the date appearing on the document, October, 1954. The exhibit was received in evidence.

The signatures appearing on the signed copies of Exhibit 20 are mine. The information appearing thereon was furnished by me from the records kept by Mrs. McDonald.

In November, 1951, I gave Ken White a check for $24,000 to purchase lots in Morningside Heights. The funds used came from moneys that had been borrowed from Prudential Federal Savings and Loan, which company loaned the money on the lots purchased from White. The moneys were given so that we could purchase those lots.

Q. Mr. McDonald, when did you first get an idea that perhaps the income tax returns that you had filed in 1949 and 1950 and prior years had been wrongly prepared?

A. In the early part of 1952 in the latter part of January or February I attended -- I was a delegate from the Utah Home Builders Association to the National Home Building Association convention in Chicago, and I was assigned to attend a tax meeting, and tax instructions was given at one of the meetings at that time.

Q. Did you attend it? A. Yes, sir.

Q. And from attending that lecture did you then have some idea that you had not been reporting your income properly? A. I had an idea that I was not reporting it correctly at that time.

Q. Did you know, as a result of your attendance at

that convention, how you should report it? A. No, sir.

Q. Shortly after that did you file your 1951 return?

149] A. Yes, we returned in February from the convention, and we filed our 1951 before March 15, 1952.

Q. And you filed that return in a similar manner as you had before, did you not? A. Yes, sir.

Q. And will you tell us why? A. The important thing to me seemed to report our income. We thought we were reporting -- the income we reported we thought was correct, and we thought that was the important thing, so we reported it the same as we had done in prior years.

Q. I don't think you understood my question exactly, Mr. McDonald. You said you had some idea that probably the method you had been using in prior years was wrong and yet you still prepared it in the same way. Would you explain why.

Well, during 1951 -- let me ask you this -- did you maintain your records in 1951 in the same way that you did in prior years? A. Our records had been maintained the same as they had been in prior years.

Q. In the manner in which the records had been maintained was it possible for you to determine the profit made on each house? A. It was impossible to determine the profit made on each house.

Q. After you attended that convention, did you understand from what you learned there that a correct method of reporting required you to return each sale?

A. No, sir.

Q. After you filed your 1951 return, did you do anything about trying to determine what the proper method of reporting was? A. Yes, sir.

Q. What did you do? A. In April or May we contacted

150] an attorney and an accountant. We contacted Mr. Staten, who is the counsel for the Utah Home Builders Association, who I was associated with in the Home Building Association.

Q. And who was the accountant? A. A Mr. Dickson. Mr. Dickson was a friend and an employee of the Western Savings and Loan at that time.

Q. Did you determine in your conversations with Mr. Staten or Mr. Dickson that you were required to return on your tax returns the sale of each house?

A. No, sir.

Q. Did they tell you that you were supposed to? I

mean, after you contacted them and in the months that followed, did you learn that that was the case?

A. In the months that followed, yes, sir, we were told that that was the proper method to file the return.

Q. Did you or your wife, or both, together with Mr. Dickson, before Mr. Spillsbury began his investigation, undertake to do anything about correcting the situation?

A. Yes, sir.

Q. What did you do? A. Mr. Dickson and Mrs. McDonald worked on our books to correct the situation which we had.

Q. Do you recall whether or not they first began working on the first six months of 1952? A. They started from the time of the incorporation of our -- which was July 1, 1952, and they started to work back from 1952.

Q. When you filed your 1952 income tax return, had they completed that reconstruction of sales for 1952?

A. They had not completed it in March of 1953.

Q. Did you have any discussion with Mr. Dickson about the preparation of, or filing of, your 1952 return?

A. Yes, sir.

151] Q. Was he able to help you in the preparation of that return? A. We didn't have enough information for Mr. Dickson to help us with our return on our income tax.

Q. Was that because you had not -- or, they had not yet completed their work for the first six months of 1952?

A. That is correct. They had not completed that work. During 1949, 1950 and 1951, I did work as a carpenter on my houses and my brother Steve worked with me.

Q. Mr. McDonald, in 1949, 1950 and 1951 did you omit reporting on your income tax returns the sales of houses or the profits made on the sales of houses other than profits you may have made on subcontract work because you intended or desired to evade taxes that might be due thereon? A. No, sir.

Cross Examination

Before I was married in 1929 and after I started work as a carpenter I attended a short class in taxation at the University of Utah. I opened both a business account, in the name of McDonald Bros. and a personal account in my name and that of my wife, at the First Security Bank in Sugarhouse. Mrs. McDonald drew most of the checks on both accounts and I drew just a few. Mrs. McDonald reported to me each month as to whether the accounts balanced each month. We kept a monthly

balance during all those years. We knew exactly what money was going in and what was going out.

I did make loans from lending agencies to finance the purchase of real estate and to build houses. I determined that construction costs exceeded the amounts we were able to borrow for each one of the houses by reason of the fact that on the first of each month our bills exceeded the money that we had to pay those bills with.

Q. Well, as a matter of fact, isn't it true, Mr. McDonald, you knew your construction cost normally exceeded the amount you were able to borrow because you were able to add up what a 2 x 4 would cost and what a sack of cement would cost and find out how many went into a house, and therefore you would know within a few dollars how much a house would cost, is that correct?

A. We didn't have an account like that at that time.
152] I could determine what a house would cost. I knew the cost of cement, nails, roofing, brick and other materials that go into a house. I think I could go into a house and fairly well appraise it and tell how much money had been spent in building the house, or to a stage of completion if the house were not completed. "I don't know as I did do that at the time". I had worked on houses since 1924. There was a period during the depression that I was not in the building business but I did do carpenter work. To determine the exact cost of a house is technical — to estimate it is not technical. In the houses we were building, we knew we were getting ahead on them. We knew that what we sold our houses for was for more than what they cost us.

Q. How did you know that? Can you tell us how you knew that? A. Well, simple arithmetic, sir.

Q. Of course it was simple arithmetic. You knew if your costs were so much, for example, $9,000, and you sold a house for $10,000, you were making a $1,000 profit, didn't you? Is that what you mean by simple arithmetic?

A. To us it wasn't profit until we had realized it, though; it wasn't profit to us until we had taken it out of the business for our own use.

Q. Now, Mr. McDonald, I would like to ask you —

The Witness: Could I add to that.

Mr. Day: Yes, if you would, please.

A. (Continuing) When we sold a house and we sold it on a real estate contract, we only received part of the money down, and then that money went into the business to pay for the materials in that. We did not consider at that time it was profit. We didn't consider it profit until we had taken that money out of the business for our own personal use.

Q. I see. Well, then, to get back to my original question: Did you think you were making a profit on the sale of these houses or did you think you were losing money, or did you think you were breaking even?

A. We were concerned about meeting our bills each month and breaking even enough to pay for material, to pay for lots, and to pay for payments on our mortgages.

153] The Court: Well, you didn't answer the question.

A. (Continuing) And to pay for wages.

The Court: You didn't answer the question. Answer counsel's question.

Q. (By Mr. Day) I appreciate, Mr. McDonald, in your business you had problems of meeting your current bills, and so on, but would you answer my question, whether you felt you were making a profit on these house sales or not.

A. We knew we were getting ahead, yes, sir.

Q. What does the word "income mean to you, Mr. McDonald?

The Court: Well, I don't believe I will permit you to ask that question.

Mr. Day: All right.

The Court: That is a question of law, really, and it is a very complicated question of law. As a matter of fact, we all have a hard time defining it.

Mr. Day: I am sure that is true, your Honor. I merely wanted to know what his interpretation was.

The Court: You are asking him a question of law. I

won't let you pursue it.

Q. (By Mr. Day) Mr. McDonald, in answer to one of Mr. Croft's questions, you stated that you did not know, or didn't know, you were required by law to report the sale of each one of these homes on your income tax returns; that is correct, isn't it? A. Yes, sir.

I did know I was required to report my income. I did look at and read my income tax returns and the instruction pamphlet that came with it. In 1949 I did follow the instruction in the pamphlet to use the tax rates shown in the instructions to figure the tentative tax. I don't recollect reading the instruction form through. I am sure I read the parts that I thought referred to our income tax.

Q. Did you read the part that refers to business or
154] profession? I want to read you the first line:

"The law taxes a business or profession on its profits, not its total receipts." Did you read that?

A. If I did read it, it didn't mean that it applied to me at that time. I likely read it and I thought it didn't apply to me.

A good number of the sales of the houses were sold on contract, and if not on contract under an agreement whereby I took a promissory note. On each of the contracts and notes there were interest payments. Interest included in a payment, whenever made, was computed. In none of the returns did I include interest income.

Q. Now, calling your attention again to the 1949 instruction pamphlet here, did you refer to the portion which is entitled "Interest," which says, "You must include in your return any interest you receive or that is credited to your account"? A. If I read it, I didn't think it applied to me.

Q. You knew you were receiving interest, didn't you?

A. The interest and the payments that came in went into the busin ss account and was used to pay bills the same as the others, of wages, to pay wages, pay materials, pay on other lots, and pay on payments on mortgages in that business account. If I read it, I am sure I thought it didn't apply to me.

My signature is on the 1950 return. I have here used the tax computation schedule -- that is, the tax rates shown on page 16 of the instructions. When you have your income figured, those are given there--the amount of the tax.

Q. (By Mr. Day) Mr. McDonald, calling your attention to this 1950 instruction pamphlet, "business or profession," did you read this or look at it? A. Again the answer is the same. If I read it, I am sure I didn't think it applied to us.

Q. (By Mr. Day) I will ask you, Mr. McDonald, if you read or considered this, under the heading "Interest": "You must include in your return any interest you receive or which is credited to your account and which can be withdrawn, by you." Did you read that and consider that?

A. If we read it, we didn't think the interest we
155] received was applicable to us because we used that the same as the other business accounts and money that came from the loans, and we paid for material, we paid for wages, we paid for other loans and other things in our business; and money received on those payments went into that account.

I don't remember how many contracts and notes I had outstanding in 1949 that were accounts receivable to me. I cannot approximate it for 1949, 1950 or 1951. In 1950 a substantial number were sold on contract, but I don't know if it would be more than half. In 1951 I think it would be less than half sold on contract. A substantial number were sold on contract and there was interest on those.

Q. Did you, Mr. McDonald, report any of that interest income in your '51 return. A. Not as interest.

Q. Did you report it in any way? A. The only thing reported was this figure $7135.

Q. And, as I understand it, that was the total of your personal living expenses plus the other incidental expenses, such as contributions to the church, and so on?

A. That is what we took out of the business for our personal use.

In computing the 1951 tax we again used the computation schedule. I don't remember using the tax schedule, but it shows that we did and we necessarily would have used it. If I read the instruction pamphlet on the section "Business or Profession" and the first line thereof, I am sure I thought it didn't apply to me.

Q. (By Mr. Day) Mr. McDonald, in this 1951 return I note for the first time that you have used a Schedule C. Why did you do that? A. What is a Schedule C?

Q. It is this form right here, Schedule C, "Schedule of Profit (or Loss) From Business or Profession and Computation of Self-Employment Tax."

A. I don't remember using it. It is here. I don't
156] remember using it.

That is in my wife's handwriting. We didn't use Schedule C in 1949. We didn't think it applied to us at that time.

Q. Didn't you think you were in business?

A. Yes, but we reported our income on this figure here; this $6735 is what we reported as income. To us, income was what we took out of our business at that time. That is what we thought was our income.

The deductions itemized are the amounts that we paid and we understood they were deductions that were allowable — contributions, interest and taxes. In regard to taxes, the $90.00 item for real estate taxes was on our personal home, and we reported as a deduction only the tax on our home. I didn't report any taxes on all the other property that I owned at the time—that was the business.

Q. (By Mr. Day) Now, Mr. McDonald, didn't you think that taxes generally were a deductible item?

A. On our home, yes, I knew that was a deductible item.

Q. Why not on your other property? A. Because that was part of the business, part of the business account that we kept separate from that. We were taking our wages out of that, this $6735, what we figured was our income at that time.

I don't remember how we arrived at the sale tax deduction of $65.00. I don't know whether we used approximately one per cent of the income. I don't remember checking whether or not it was proper to use an estimated figure of one per cent. I didn't keep track of every dollar purchase. It would, of necessity, have to be an estimated item.

In the 1950 return, the interest item of $110.00 paid to Tracy Loan and Trust Company was interest on our home. At that time I was paying substantial amounts of interest on all of the loans I had. It was considered the same as in the other case, part of the business, and our income

to us, particularly, in this case was $5769.50." The total income listed is the top figure on the form -- $6975.00.

Q. Now, under taxes this year you have listed: Home,
157] $95.50. Weren't you at that time paying taxes on considerable other property? A. In the business, yes, sir.

Q. And wouldn't that be true, also, Mr. McDonald, of the year 1951 where you list taxes on your home only and your automobile? A. Yes, sir.

Q. Now, what about this interest item to Tracy-Collins Trust Company? Was that also on your small home loan, or loan on your own home? A. Yes, sir.

Q. And at the same time you were paying large amounts of interest on these business loans? A. Yes, sir, we figured the business took separate, that our income was this, on this particular year, $7135, and these were deductible items.

Q. If you figured that your business was a separate entity, Mr. McDonald, did you ever consider filing a business return, or a return for the business?

A. It never entered our head to return a separate return on that.

We incorporated as of July 1, 1952.

Q. Why did you incorporate? A. After this period after we had made our 1951 return, at that time it was when we had returned from Chicago, I had an idea that our taxes were not correct, the method of reporting was not correct, so I contacted Mr. Earl Staten, who is associated with me in the Utah Home Building Association, and I asked advice on what we should do in our business at this time. It was upon his advice that we incorporated.

Q. Was there any particular reason for incorporating, other than he just said you ought to? Did he give you any reason for it or did you arrive at any reason or conclusion as to why you should incorporate? A. I don't remember the details of our conversation at that time. It went over a period of from March, during April, May and June I had my conferences with Mr. Staten about the incorporation.

The Home Builders is an association of Utah home
158] builders. I was a member and I don't remember whether I was on the board of directors at this time. I think not at this time.

The convention I attended was in Chicago, Illinois.

Q. And what was the nature of this lecture that you

say you attended wherein you learned that you were not handling your tax returns properly? A. It was a very technical lecture to me. I didn't understand what was going on.

It was about taxes and applicable especially to home builders.

Q. And did they discuss any problems about computing your taxes on the profits you would make on a home, or what did they talk about? A. There was a lot went on in that convention. I attended two tax meetings at that time. I brought home a brochure they gave us when we went out of that meeting, a typewritten copy of some of the things which were discussed. I don't remember exactly what was discussed. I do remember that I came with the idea that the method that I had been using to report taxes was not correct.

Q. I see. Now, when you returned to Salt Lake City, you contacted Mr. Staten about that, is that correct?

A. It was in May — April, May, and June that I contacted Mr. Staten about it.

Q. Well, that was in February, I believe you stated when you attended the convention and got the idea that you were reporting your taxes improperly?

A. Yes, sir, it would be the end of February or the first of March when we returned to Salt Lake City.

I signed my 1951 return stamped filed on March 18, 1952 on March 13, 1952.

Q. It was about a month previous to that that you had
159] learned you were filing your income tax return improperly, or by an improper method, is that correct?

A. Yes, it would be a month before that that I attended the convention. It would be the end of March — it would be the end of February when we returned to our home.

Q. This return was filed in an identical manner to the other returns, wasn't it? A. Yes, sir.

Q. You added up your total of personal living expenses and apportioned it on an arbitrary basis?

A. Though I had attended the convention and though I had listened to these tax talks, I still didn't know what I was doing wrong. I came away with the idea that I was doing it wrong and it should be corrected.

Q. But you didn't consult Mr. Staten until a month or two later than this? A. It was after this time. We reported it the same way we had done in previous years.

I never did inquire of the Collector of Internal Revenue or any other agent of Internal Revenue about my tax returns, particularly 1949, 1950 and 1951. I made no inquiry at any other place.

With reference to Schedule C in the 1951 return, I do not know why that was included in the 1951 return.

Q. Would it have been, Mr. McDonald, because on this year you desired to compute a self-employment tax, which you paid, of $81 to get on the Social Security set-up?

A. I wouldn't know that, sir.

Q. You wouldn't know? A. No, sir. We used this same figure here.

Q. Yes. A. We used the same figures here and here. Why we used that I do not know, sir.

Q. On the first page, you say: Total wages of $7135, showing the four employers, Western Loan and Building, Prudential Federal, and so on, and then in Schedule C, which you have included this year, you show total receipts from business or profession, the same figure, $7135.

A. Yes, sir.

160] Q. Is that correct? A. Those are the same figures that we used here, we used here.

Q. At that time, Mr. McDonald, was the total of $7135 the total receipts from your business? A. That was the total receipts that we received for our personal use, yes, sir.

Q. That is, the total receipts you took out of your business and spent on personal living expenses, isn't it?

A. That was the total we had for our personal use, yes, sir.

Q. It was not the total receipts from your business, though, was it? A. No, sir. I don't know why we used that figure, sir.

The Court: Do those returns for any one or all of the three years show anything at all about the real estate transactions he was carrying on?

Q. (By Mr. Day) Do they, Mr. McDonald?

The Court: Anything at all on those returns, any figure, any entry, that shows anything about the very substantial real estate transactions he was carrying on?

Q. (By Mr. Day) Can you answer that, Mr. McDonald? Do those returns show anything about your real estate business,

sales of homes, or building homes?

A. They only show what we took out of the business.

Mr. Day: They do not, your Honor.

Mr. Croft: We will so stipulate.

The financial statement dated October 10, 1948, in Exhibit 20 or 35, is not in my handwriting. The signature appears to be mine.

My signature is on Exhibit 20. The figures were prepared by my wife and me. A net worth of $252,000, total assets of $447,000 less $194,000 liabilities, is what is written down on it. I presented that to the First Security Bank on or about December 31, 1951. I presented it as a true and correct picture of our business. It was given as financial background information so the bank would loan us money. That would be true of the other financial statements bearing my signature — the statement to First National Bank in 1948, the ones to First Security Bank on July 27, 1951 and March 17, 1949. They were supposed to be a true and correct statement of our net worth at the time. I presented the statement of March 17, 1949, showing a net worth of $73,883.00. That was an application for a business loan.

161] The Court: This application was made not by the business, but by this individual. Of course, he is the business. This is operated as a proprietorship, isn't it?

The Witness: We didn't consider it that, sir.

The Court: I don't see how you could consider it anything else. You weren't a corporation. You were carrying on a business as an individual; wasn't that the situation?

Q. (By Mr. Day) So that your net worth had increased had it not, Mr. McDonald — well, this one March 17, 1949, where you list $73,000, up to $252,000? A. Yes, sir, I knew that our ground was growing in value. That ground we bought back in 1924 was growing in value; the ground

we bought for $6,000 we list as $70,000. The water stock had gone up from $25 a share to $150 a share. We knew that we had real estate contracts which we had received nothing on, but we considered it part of the business, sir.

In March, 1949, real estate is listed at $43,500.00, and at $68,500 on December 31, 1949. Some of these listed as my own only half of what we owned together and some of them are the combined assets of Stevenson and J. S. McDonald. The assets listed on the December 31, 1951 statement that were owned jointly with Stevenson include building materials — $10,250.00 and cash on hand $12,731.00.

The Court: Who owned that $12,000 in cash?

Q. (By Mr. Day) Who owned that, Mr. McDonald?
A. That was McDonald Bros.

The Court: Well, there wasn't any corporation at that time, so who are McDonald Bros.?

162] The Witness: J. S. McDonald and Stevenson McDonald.

The Court: How much of that did your brother own and how much did you own?

The Witness: I owned 50 per cent of that, sir.

Q. (By Mr. Day) You owned 50 per cent of the cash on hand in your McDonald Bros. account?
A. We considered that as a business account. At this time I don't know how I considered it, sir. This is the December, 1951.

The Court: Well, find out who owned these assets.

Mr. Day: Yes, your Honor, I will endeavor to do that.

Q. (By Mr. Day) Mr. McDonald, as of December 31, 1951, who owned the cash on hand in your McDonald Bros. account at First Security Bank? A. That was a joint account. McDonald Bros. was a joint account, J. S. McDonald and Stevenson McDonald.
Q. Did Stevenson McDonald ever draw a check on that account? A. I am not sure whether he drew any checks on

that account -- yes, sir, when I was away he drew one or two checks on that account.

Q. Isn't it true, Mr. McDonald, that the only funds that were paid to Stevenson out of your McDonald Bros. account at the First Security Bank were salary checks that were paid to him and you reported him as your employee during all of this time? A. That is correct, we reported --

Q. Is that correct? A. (Continuing) -- him as an employee. I took out an account number at the State at one time, about 1941 or 1942, and I asked them about how to carry on that business, and they said that we could not both of us -- or if we were partners we couldn't have Social Security -- that is not the right number -- it is state compensation -- only one of us could have state compensation, one would have to take the state insurance out in his name, so we took the state insurance out in J. S. McDonald and carried on the business in J. S. Mc Donald's name; and at this time, in 1951, that was the status of the business. We did pay him wages out of that business the same as we gave myself; what I took out of the business I considered wages that I had earned, and that was what I considered as income at that time. As you will notice each year the amount we took out of the business is what I reported for income. That is what I considered as income the same as my brother considered his wages, which was correct, as income.

163] Q. Well, now, Mr. McDonald, to get back to my question--

The Court: Well, before you get back to your question, I have a question.

Mr. Day: All right, your Honor.

The Court: The reason you didn't do business as partners was because you wanted one of you to be on the state social security, is that it?

The Witness: That was one of the reasons I didn't think about a partnership.

The Court: You weren't partners were you?

The Witness: I do not know.

The Court: Well, you ran the business and Stevenson was a salaried employee, wasn't he?

The Witness: That was the way it worked, yes.

The Court: Well, that is the way it was, isn't it?

The Witness: I do not know.

Q. (By Mr. Day) Isn't it true, Mr. McDonald, that the only funds that Mr. Stevenson McDonald ever got out of your McDonald Bros. account in the First Security Bank, which was the only bank account you had in that name wasn't it, during these years, 1949, 1950 and 1951, were salary checks to him? A. Everything he drew he drew as salary checks, yes, sir.

Q. And you reported those amounts of salary on your withholding returns which you made to the Government, which Mr. Croft has introduced as evidence here?

A. Yes, sir.

164] Q. Aside from that, you or your wife, and generally your wife, drew every check on the account, didn't she?

A. Generally my wife drew the account, wrote all the checks, with very few exceptions that my wife didn't write all the checks.

Q. Isn't it true, Mr. McDonald, that you considered the cash on hand in the First Security Bank in the name of McDonald Bros. as your account? A. No, sir.

Q. What did you consider it? A. As the business account to pay for lots, to pay for mortgages, to pay for wages.

Q. But it was your business, wasn't it?

A. I don't know, sir.

Stevenson and I owned a farm in Holladay and sold two or three lots from it during this period. Except for those, I think everything was done in the name of J. S. McDonald (and his wife).

The increase of the value of the farm as shown on the December 31, 1951 statement over what it was shown at in March, 1949 is $27,000.00 — $13,000.00 up to $40,000.00. The increase shown on these statements on the value of the water stock is about $10,000.00 - $8600.00 up to $18,610.00. One-half of the increase is Stevenson's. We reported them

worth $37,000.00 more at the end than at the beginning. The difference between the net worth at the beginning and at the end is $179,000 according to the financial statement figures, $37,000 of which can be attributed to the increase placed upon the value of the real estate and water stock. The difference of $142,000.00 would be from other sources.

Plaintiff's exhibits 56, 57 and 58, the three Internal Revenue Service instruction pamphlets for 1949, 1950 and 1951, were received in evidence.

De VEARL W. DIMOND, called as a witness for the defendant, testified as follows:

Direct Examination

I am a certified public accountant. I worked for the Bureau of Internal Revenue as a revenue agent from January, 1946 until May, 1952. It was then stipulated that Mr. Dimond was qualified as an expert accountant. I have had an opportunity to examine the books and records of J. S. McDonald and I have prepared schedules. I have examined the cash and disbursements book, the bank statements and cancelled checks and the individual folders on each sale of property in Exhibit "KK". I have also examined the compilations, or accumulations or reconstructions of some records, work done by the McDonalds and Lyle Dickson. Defendant's Exhibit "PP" is a schedule consisting of an analysis of the cash receipts books and the bank deposits for the years 1949, 1950 and 1951 on the McDonald Bros. account at the First Security Bank. That includes Exhibit "II" and the bank statements.

165] Defendant's Exhibit "OO" consists of summaries for the years 1949, 1950 and 1951, of deposits to the personal account of J.S. and May McDonald and the drawings for each of the years, as reflected by the cash receipts and disbursement books, from McDonald Bros.

Defendant's Exhibit "NN" is a schedule I prepared which indicates the installment sales or contract sales which would qualify as installment sales in each of the years 1949, 1950 and 1951 and it shows the installment contract

balances at the end of 1949, 1950 and 1951. It also shows a computation of profit which might be deferred under an installment reporting in each of those years 1949, 1950 and 1951. Exhibits "NN", "OO" and "PP" were offered into evidence.

Voir Dire Examination

In regard to Exhibit "NN", no reporting was made on the returns filed on the installment basis. The schedule is an installment reporting that might have been elected. It was not elected in the returns filed. Exhibits "OO" and "PP" were prepared from matters that are here in evidence.

Q. (By Mr. Day) But Exhibit NN, this was prepared on something you assumed? A. It is prepared from things in evidence, records in evidence, yes.

The Court: But he didn't make an election to report on an installment basis, did he?

The Witness: No election was made in the return.

Mr. Day: I object to NN.

166] Direct Examination By Mr. Croft:

Q. Let me ask you this further question: Do these balances shown on the schedule, Mr. Dimond, reflect balances due on contract sales in 1949, 1950 and 1951 that were made and which are in evidence? A. Yes, sir.

Mr. Croft: We offer the exhibit, your Honor.

The Court: It is hypothetical: What would have been the result if he had acted differently than he did?

Mr. Croft: Well, I think it is material and important on the question of intent.

The Court: I don't think it has any bearing on his intent. He didn't think about an installment sales method. He didn't make any election. In fact, he didn't report any of this.

Mr. Croft: I know that. He didn't understand that phase of it.

The Court: How could it bear on his intent? This is something tha a CPA, long after the event, has fixed up on some hypothetical basis that he might have adopted if he had thought about it at the time. Objection sustained.

Mr. Croft: You may cross-examine.

On further voir dire, with respect to Exhibit "PP" the first column on the far right indicates a date entered in the receipts and disbursement journal of moneys that were received and entered in the book, the second column indicates the source of the money. This came from the cash receipts and disbursements journal (Exhibit "II") the bank statements, checks, and occasionally an address was obtained from the sales files. As to Exhibit "OO", the source of information came from personal bank statements of J. S. and May McDonald, from which the date and amount of deposit was taken, and the next column shows the drawings from McDonald Bros. by check number and amount which were obtained from the cash receipts and disbursement journals and verified from the cancelled checks themselves. Deposits that were made to the personal account that did not come from McDonald Bros. are identified in a further column, the few that there are, from the cash receipts and disbursement books of the personal account, which is in back of Exhibit "II". Receipts and disbursement were kept on the personal records -- in the back, coming forward. One or two items were not identified as to source, one of which Mrs. McDonald traced back and found it came from her son's savings account. Exbibits "OO" and "PP" were received in evidence.

167] Cross Examination

My examination of the records was during May and June, 1956. Some may have been done in April.

Exhibit "QQ", a certified copy of Articles of Incorporation of McDonald Bros., Inc., was offered into evidence. Counsel for the government had no objection but

the court on its own motion ruled the exhibit immaterial and excluded the exhibit. The date of incorporation was stated to be July 1, 1956.

Defendant rested. The Government has no rebuttal. A motion to direct a verdict of acquittal was made as follows:

Mr. Croft: If the Court please, at this time, comes now the defendant and moves the court to direct a verdict of acquittal on the grounds that the Government in its proof of the case has failed to establish by clear and convincing evidence that the defendant is guilty of the offense with which he is charged and for the reason specifically that the Government in its evidence has failed to prove beyond a reasonable doubt that the defendant wilfully intended to defeat and evade a large part of the income taxes due and owing by him for the years in question as charged in the indictment.

I will be glad to discuss this question of intent if your Honor feels that it is something you desire to take some time to hear.

The Government's case, as I see it, as far as the intent of the defendant to evade taxes is concerned, lies in his return alone.

The Court: No. There isn't any purpose in arguing that question to me. I think there is a good deal of evidence of intent wilfully to attempt to defeat and evade.

168] In the first place, here is a man who owns a business. He is the sole proprietor, really. His brother just works for him; he is paid wages. As sole proprietor, he is carrying on a real estate and contracting business of considerable volume. As a matter of fact, he increases his net worth in the three years from around 70 to 75 thousand dollars to a quarter of a million dollars, in the neighborhood of a quarter of a million dollars; and he very carefully avoids saying anything about that in his returns for three years -- not only for those three years, but for years prior thereto and years since, and he says

he just didn't consider that income.

Now, it is hard for me to believe that a man who has the business acumen to carry on that kind of an enterprise didn't know that he was making a profit that he ought to report. That is considerably volume.

Now, in his returns he didn't report a dime of it. He calls himself a carpenter, doesn't mention his real estate activities either on the income side or the deduction side. He knew that taxes on the home were deductible, but he didn't know that taxes on other real estate which he owned individually were deductible.

I think it is a fair inference that he was concealing the whole operation for income tax purposes. It looks to me like he was deliberately leaving it out, not only on the income side, but on the deductions side, and anywhere else where it might normally appear on the returns. As a matter of fact, it is his major activity. Sure, he did some carpenter work, but his major activity, his income-producing activity was running that business.

Now, to say that he understands that his income is limited only to the money he spent for living expenses or church contributions, for the little expense items of normal living, doesn't make sense to me.

Mr. Croft: Of course, his concept --

The Court: Wait a minute, I am not through.

Mr. Croft: Excuse me.

The Court: To say that he regards income as only the money he spends for living and that his savings, in very substantial annual amounts, in the neighborhood of $25,000 a year, is not income -- it would be hard for me to believe that.

169] Now, of course, the credibility of the witnesses is a question for the jury, for the jury to decide whether they believe him or whether they do not believe him, whether they believe his wife or whether they do not

believe his wife. That is a jury question. That isn't a question for me to decide; but, if I were called upon to decide it, I would decide it against the defendant.

Here is a very large business activity, quite a lot of ramifications. It is not a simple one, either; it is complex. He has a good understanding of that. He has such a good understanding of that that he has made a lot of money on it, and he hasn't reported a dime of it on his returns, a complete omission to report.

Now, that was not the corporation, this business of his; it was a business he was operating as an individual. He was operating that as an individual in just the same way as doing the carpenter work as an individual, just exactly.

Now, he chooses to report only what he spends and not what he saves. I think we might recommend that to Congress for an amendment to the Internal Revenue Code. I believe that if you could exempt from reporting everything folks save, it would be the biggest deterrent to inflation we have had in a long time, because folks would be greatly encouraged to put their money away and hold onto it. As a matter of fact, I think a fellow could run for public office on that platform and make a good deal of headway, especially if he were running for Congress, or the Senate, and would say, "I am going to recommend an amendment to the tax laws that says savings are not taxable. It is only what you have to spend for expenses that is taxable."

Well, that is his situation, isn't it?

Mr. Croft: That, of course, is his situation. We recognize the fact that none of the sales were reported on his income tax return. We recognize the fact that there is going to be considerable tax due. Our defense is that this man did not understand the responsibility that he had in the sale of his houses and the reporting of them on his income tax return.

170] His concept of income was not his living expenses. I don't think it is quite proper to term it that. He withdrew from the business, as the evidence shows, certain

amounts of money that they deposited in their personal account, and that is what they considered income to them to be. Until they did so, they didn't believe it to be income to them.

I might say this, your Honor, that during the past year I have examined this case and all of these records very carefully and tried to find evidence that I always found present in other income tax cases that I had anything to do with, and there is nothing -- and I say this to your Honor in all sincerity -- there is nothing that I have found in the records or any part of the papers that I have examined that indicates that these people in any way tried to hide or conceal income.

The Court: Well, there is something on the fact of the returns.

Mr. Croft: That is true, your Honor.

The Court: He didn't report a single thing about this business to the Government, didn't have the slightest hint on those returns, not the slightest, that he had a great big real estate business. That indicates intent to conceal.

Mr. Croft: At the same time, during the same years, he filed employment tax returns with the United States Government and reported to them on those returns.

In connection with this question of what his concept of income was, your Honor, I would like to point out that during these years in question, on the financial statements, or on applications for loans, where there is a question as to his annual income, it is usually in the sum of six thousand or seven thousand dollars. I think that ties in with his concept of income that he has testified to here, and to me that sort of thing demonstrates a great deal in this case, that this man, during those years, did believe that what his income was was what he took out of the business.

171] The Court: Well, all you are saying is that what he took out of the business for personal living

expenses and the like is what he reported.

Mr. Croft: Because that was his concept.

The Court: And then you say: What he reported being what he actually withdrew shows that was his concept of income. It doesn't show me anything of the kind. It is just what he did.

Mr. Croft: I say the evidence here indicates that whenever he was asked what his annual income was, it was in the neighborhood of six or seven thousand dollars, which is entirely consistent with the theory of the defense in this case.

The Court: Well, you have, in addition, the applications for loans, and there are a number of them. In each of the three years, when he got around to applying for a loan at the bank, and they required a financial statement, he showed perfectly well what had been his earnings, what had been his increase from profits. He didn't have any difficulty about that. He showed that he understood that.

You are asking me, Mr. Croft, to believe that this man saw an increase in his wealth from profits from $70,000 to over $200,000 and didn't know that he had made any income.

Mr. Croft: I say he didn't understand what income was.

The Court: That is incredible.

Mr. Croft: And I believe it with all the sincerity of my heart.

The Court: That is a jury question. The motion is to take it from the jury. I think that is improper. The motion will be denied.

(Jury returns.)

The Court: Now, let the record show that for the first time I find requests for instructions on my bench. Of course, I have had no opportunity to look at them.

Mr. Croft: I am sorry.

The Court: And I have had, therefore, no opportunity to rule on them. Under the rule you are entitled to have my ruling about your requests before you argue to the jury, but I can't give it to you unless you hand them up to me in time.

172] Go ahead.

After argument by counsel, the court instructed the jury as follows:

The Court: Ladies and gentlemen of the jury, it now becomes my duty to instruct you, or to attempt to, as to what the law is which applies to this case.

You have heard the opening statements of counsel at the beginning of the trial, you have heard the testimony of the witnesses, you have heard some of these exhibits read to you. All of the exhibits will come into the jury room with you. In addition, you have heard the two counsel argue this case to you at the conclusion of the trial.

It now becomes your obligation to pay strict heed to what the Court has to tell you about the law. You ladies and gentlemen of the jury are going to decide for us all the issues of fact in this case. It is not within my province to decide those questions. Those questions will be submitted to you, and in my charge I shall attempt to tell you what the questions are that it is for you to decide.

It is my duty to decide the questions of law, and twice during the course of the trial we have had questions of law argued to the Court and I have decided those. In my charge I shall decide some other questions of law for you, and I trust that when I am through you will have a clear understanding of what it is that you are called upon here to do.

To start out with, ladies and gentlemen of the jury, the Congress of the United States has enacted into law a provision in the Internal Revenue Code, which is also a part of the criminal code of the Nation. That provision is Section 145 (b) of Title 26 of the United States Code, which, so far as is important, reads as follows:

173] "Any person who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter shall be guilty of a criminal offense," as the statute goes on to provide.

The gist of the offense, ladies and gentlemen of the jury, under that section of the code, is a wilful attempt in any manner to evade or defeat the tax imposed by the chapter, which is the personal income tax involved in this case.

A grand jury was called to attend upon the Court, evidence was presented to the grand jury, and it returned an indictment. In that indictment the defendant Mr. McDonald was charged in the first count with wilfully and knowingly attempting to defeat and evade a large part of his income tax for the year 1949 by filing a false and fraudulent return. In the second count the grand jury charged Mr. McDonald with the same offense for the year 1950, and in the third count the grand jury charged Mr. McDonald with the same offense for 1951.

Now, ladies and gentlemen of the jury, I want to examine with you for a moment the language of the indictment, because the indictment is the charge of the United States Government against this defendant, and I want you to understand clearly with what offense he is charged.

There are three elements spelled out in the indictment: (1) a wilful and knowing attempt, (2) to defeat and evade a large part of his income tax for the year in question, (3) by filing a false and fraudulent return. Those are the elements of the offense with which he is charged here.

Ladies and gentlemen of the jury, when the grand jury returned that indictment to the Court, the defendant was notified and given an opportunity to come here and to say

whether he was guilty or not guilty of those offenses. The defendant entered his plea of not guilty to each and every one of the counts of the indictment. In that state of the record, ladies and gentlemen of the jury, the defendant has placed in issue every material and essential element of the offenses charged. He denied each and every essential of the crime charged. He puts the Government on its proof and, I say, in that state of the record it becomes incumbent upon the United States to produce evidence here which you believe and which satisfies your minds beyond a reasonable doubt of the guilt of the defendant. It becomes incumbent upon the Government of the United States to establish beyond a reasonable doubt the existence of each and every one of the essential elements of the charges which I have analyzed with you here.

174] This defendant, as is the case with every defendant who comes before the bar of this court and any American court, comes clothed with a presumption of innocence, and he is presumed innocent until the United States produces the kind of evidence I have told you about; that is to say, he is presumed innocent until the United States produces evidence which you believe and which satisfied your minds beyond a reasonable doubt that he is guilty as charged.

Now, ladies and gentlemen of the jury, I have used the words, "beyond a reasonable doubt." By a "reasonable doubt" I mean one that is based upon the evidence, because it is upon the evidence that you are to decide this case. By "beyond a reasonable doubt" is not meant every possible doubt, but is meant that kind of doubt that would suggest itself to a reasonable person, and of such weight that it would deter such person from acting or deciding in matters of the highest importance to him or to her.

If you have such a doubt of the defendant's guilt as to any one or more of the counts in this indictment, you will find the defendant not guilty on such count or counts as to which you entertain such a doubt.

If, ladies and gentlemen, on the other hand, you have no such doubt, but are persuaded of the defendant's guilt to a moral certainty as to any one or more of the counts

of the indictment and have an abiding conviction of such guilt, it will be your duty to find the defendant guilty under such count or counts as to which you are so persuaded and convinced that he is guilty.

175] Now, ladies and gentlemen of the jury, I have used the term "wilfully." The Act of Congress uses the term "wilfully", the indictment uses the term "wilfully." It is necessary that the Government prove beyond a reasonable doubt that what the defendant did he did wilfully. Now, by "wilfully," ladies and gentlemen of the jury, we mean intentionally, knowingly, with a bad purpose; in this case, the bad purpose of cheating the United States out of its income tax. "Wilfully" does not mean negligently or accidentally or inadvertently.

Ladies and gentlemen of the jury, at the outset of this trial I spoke to you about an obligation to try the case on the evidence. The evidence, ladies and gentlemen of the jury, as I told you then, is the testimony of the witnesses and the exhibits which are received into the record, and that is all of it. The grand jury indictment is not evidence, the opening statements of counsel are not evidence, the closing summations they have just made to you are not evidence, nothing that I say or have said during the course of this trial is evidence. The evidence, ladies and gentlemen of the jury, is the sworn testimony of the witnesses as you have heard that testimony fall from their lips from the witness stand and the exhibits that are received here in the record, which will go into the jury room with you.

Now, ladies and gentlemen of the jury, the principal issue in this case is whether the defendant did what he did wilfully and knowingly and intentionally, and it is not necessary that the Government produce direct testimony of what was in the defendant's mind at the time he filed these returns. As a matter of fact, it must be clear to you, clear to us all, that it is often impossible to produce direct testimony of what is in a person's mind. An old judge back in the 1200's once said that the devil himself knoweth not what is in the mind of man. You have to prove what is in a man's mind by circumstantial evidence; that is to say, you prove what he did, how he acted, and ofttimes

what he said, and from such evidence you infer what was his state of mind. Now, that is what we call circumstantial evidence.

176] Ladies and gentlemen of the jury, in deciding this question of wilfulness and knowledge and intent you may take into account all of the facts proved in evidence and, in addition, ladies and gentlemen of the jury, you may take into account those inferences which you think it is reasonable to draw from the facts proven in this case.

You, ladies and gentlemen of the jury, may use your intelligence and common sense in examining and looking at this evidence and from such an examination you may draw such inferences and deductions and conclusions as to what his intent was at the important times, you may draw such inferences, deductions, and conclusions as seem to you fair and reasonable, but you must draw them, of course, only from the evidence and the facts proven by the evidence.

Now, ladies and gentlemen of the jury, this is not a simple case. This is what the people who deal with such cases call a net worth case, and a net worth case is not a simple case in any sense of the word. It is not to be assumed that you ladies and gentlemen of the jury have had any experience with net worth income tax cases, and so it becomes necessary for me to tell you what a net worth case is, to explain it to you a little bit.

A man's net worth is the difference between the asset side of his financial statement and the obligation side of his financial statement; that is to say, his net worth is what he is worth over and above his debts and obligations.

The United States Government claims in this case that they had no access to the books and records of this defendant so they could not determine from those books and records whether he owed any more tax or not, so what they undertook to do, they say, was to find out what he owned and what he owed at the beginning of the period in question here. So, after such an investigation, the Government has a list of property which they claim the defendant owned

on December 31, 1948, and they have added that column up. Those are his assets. On the other side of the financial statement is a column of liabilities. Those are the things the defendant owed. And they subtract the liabilities from the assets, and the difference is his net worth on December 31, 1948.

177] Now, they do the same thing exactly at the end of 1949, December 31, 1949. They add up what property he has, what it was worth, and they add up what his debts were, liabilities, obligations, and they subtract the debts from the assets and they find a figure which is net worth, and then they ask you to consider that there is an increase between the net worth on December 31, 1948 and December 31, 1949, and the Government claims that the usual way a man increases his net worth, increased his wealth, is out of the profits of his business. Now, unless the taxpayer has some other explanation of where he got the money, the Government charges him with the increase in his net worth from December 31, 1948 to December 31, 1949 as income for that period.

Now, perhaps in that year a man might inherit the money from an ancestor, or perhaps in that year someone might give it to him. There might be another explanation of how he got that money. But if he has no explanation of how he got the money, in view of the fact that ordinarily the increase in wealth from year to year is due to profits that he earns in his business, the Government attributes that increase to him and charges it to him and imposes a tax upon him. That is the theory, ladies and gentlemen, of the net worth method of proving any income tax due.

In this case the Government goes further and shows what his net worth was on December 31, 1950, and they show an increase between the net worth on December 31, 1949 and the net worth on December 31, 1950, and they say that increase in net worth is income which he received from his trade or business during the year, and it is taxable income.

The Government goes still further, and they determine the net worth for December 31, 1951 and they show an increase again between the net worth on December 31, 1950 and the net worth on December 31, 1951.

178] In fact, over the whole period of three years the Government shows that on December 31, 1948 he had a net worth of $102,000 -- those are the Government's figures of what he was worth on that date; the defendant's own figure was $71,000 -- and on December 31, 1951 the Government determines that his net worth was $177,000, and the difference between those two figures, the two Government figures, is $75,000 increase over the three years.

Moreover, the United States claims that he must have, of course, used some money for living expenses, and they arrive at a figure for that of about $6,000 a year, or $18,000 for the total period. And that is the method by which the Government attempts here to demonstrate that this taxpayer, in fact, had large receipts, profits, from his business which he did not report.

Now, ladies and gentlemen of the jury, I refer to that for the purpose of explaining to you the net worth method, which is a well accepted method of proving a tax case. It is approved by the Supreme Court of the United States, the principles there laid down, and I have attempted to lay them down here for you this afternoon.

Now, ladies and gentlemen of the jury, when you retire to the jury room, it will be your duty to examine this evidence and all of it carefully, thoroughly, and with complete impartiality, laying aside all bias or prejudice of any kind or nature whatsoever. If, after such an examination of the evidence, ladies and gentlemen of the jury, there is any reasonable theory upon which you can explain this evidence and reconcile it with the innocence of this defendant, you should do it; but, on the other hand, ladies and gentlemen of the jury, if you are satisfied beyond a reasonable doubt and have an abiding conviction that this man wilfully and knowingly attempted to defeat and evade a large part of his income tax by filing false and fraudulent returns in which he failed to report his business income, it is your duty to convict him and return a verdict of guilty.

Ladies and gentlemen of the jury, when you retire to the jury room, select one of your number foreman. The verdict must be signed by the foreman and returned into court.

The verdict will have on it a blank before the word "guilty" in three places in reference to the three counts. If you find him guilty, leave the blank the way it is. If you find him not guilty, write the word "not" in there.

179] Ladies and gentlemen of the jury, I will say further to you that the income tax law is a part of the law of the land. The wisdom of that law was passed upon by Congress, composed of your Congressmen, your Senators. It is binding upon all of us. It is binding upon me and it is binding upon you, it is binding upon this defendant. It is no part of your function here to decide this case upon the wisdom or unwisdom of that statute, or whether you like to pay taxes or do not. When you retire to the jury room, your solemn duty will be to do justice between the United States of American and this defendant, and there is no higher obligation ever imposed upon man or woman than to do that.

As you no doubt know, under the rule you gentlemen are entitled to take your exceptions to the Court's charge in the presence of this jury and before they retire, but out of their hearing. That presents a problem here, where you gentlemen come up to the bench and whisper to the court reporter, so we don't do it that way. We ask you, if you want to, to agree that the exceptions may be taken after the jury retire and out of their presence and that they may be deemed to have been taken in conformity with the rule. Do you desire to enter into that stipulation?

Mr. Day: The Government would so stipulate, your Honor, but I wonder if before the jury retires I might approach the bench.

The Court: Yes, indeed.

Mr. Croft: We would so stipulate.

(Court and Counsel confer.)

The Court: Counsel called my attention, ladies and gentlemen of the jury to the fact that in my charge to you I said that the Government had computed his net worth year by year for the three years. They say they didn't do that, that what they did was compute the net worth for the three-year

period; that is to say, they found out what his net worth was, or what they thought his net worth was, on December 31, 1948, and that figure was about $102,000, and they computed what it was on December 31, 1951, and they claim it was $177,000, and the difference between the two, they say, is his increase in net worth for the three-year period. And then what they did was allocate a third of that to each of the years, rather than to compute it at the beginning and end of each of the three years. I have made that misstatement, and I now correct it.

180] All right, ladies and gentlemen of the jury, you may retire to the jury room. I am going to release you at 5 o'clock, so you won't need to be around here all afternoon.

(Jury retires)

The Court: You may take your exceptions.

Mr. Day: The Government has none, your Honor.

Mr. Croft: Comes now the defendant Joseph S. McDonald and excepts to the Court's failure to give the defendant's requested instruction No. 1, excepts to the Court's failure to give defendant's requested instructions No. 3, No. 4, No. 5, No. 6, No. 7, No. 8, No. 9, No. 10, and No. 11.

The defendant further excepts to the Court's instructions in that the defendant believes that the Court's instructions weighed heavily in the Government's favor in setting out the Government's theory of the case without explaining to the jury in equal detail the defendant's theory of the defense to the case.

I think that is all I have, your Honor.

Mr. Day: I stipulate that our exhibits are all here and the defendant's exhibits are all here.

Mr. Croft: I agree.

June 29, 1956

The Court: The marshal will take the jury to the jury

room this morning to resume their deliberations.

181] The Foreman: Your Honor, before we retire, there was a question that came up yesterday, and I think perhaps the Court could answer it. Should we have a copy of the charge? The question came up exactly how the charge was worded.

The Court: Yes. You mean the indictment.

The Foreman: Yes.

The Court: Yes, you should have that. Take the indictment out of the file and turn it over to the marshal to take into the jury room.

The Foreman: That will answer it.

The Court: All right.

(Jury retires.)

Filed Oct. 4, 1956.

5] Defendant's Request For Instructions.

The defendant respectfully requests the Court to instruct the Jury in accordance with the following requests, each request being separately stated, numbered 1 to 11, inclusive.

Earl P. Staten
Bryant H. Croft
Attorneys for Defendant

6] Defendant's Requested Instruction No. 1

The indictment in this case charges that for the calendar years 1949, 1950 and 1951, the defendant did wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him to the United States by filing a false and fraudulent income tax return wherein

it is alleged, he understated his net income and the tax due and owing thereon in various amounts for each of the three years involved.

The defendant comes into this court under a presumption of innocence and the burden is on the Government to prove his guilt to your satisfaction beyond a reasonable doubt.

In this case the Government must prove (1) that there was an attempt by the defendant to evade and defeat his income taxes; (2) that such attempt was done wilfully; and (3) that there is an additional tax owing.

It is alleged in the indictment that defendant attempted to evade his taxes by filing a false and fraudulent return. An attempt here means an affirmative act done with an evil intent or motive or a bad heart.

Honest mistake or belief on the part of a defendant is a complete defense against a charge of attempting to evade or defeat an income tax.

There is a distinction between an erroneous tax return and one which is fraudulent. An actual bona fide misconception of the law, regardless of the presumption that the taxpayer knows the law, will not result in criminal liability under the statute of which the defendant stands charged.

* * * * *

8] Defendant's Requested Instruction No. 3

The law is complicated, and accounting treatment of various items raises problems of great complexity, and innocent errors and misunderstandings are numerous, as appears from the numbers who make overpayment. It is not the purpose of the law to penalize frank difference of opinion, or innocent errors, or a lack of understanding on the part of a taxpayer. Such errors are corrected by the assessment of the deficiency of tax and its collection with interest for the delay.

If any part of the deficiency is due to negligence

or intentional disregard of rules and regulations, but without intent to defraud, no violation of law is committed. In order to find the defendant guilty in this case you must find that he wilfully attempted to evade tax by filing false returns. It is not enought that the returns were improperly prepared. In order to find defendant guilty you must find, beyond a reasonable doubt, that they were made false by the defendant to evade tax.

9] Defendant's Requested Instruction No. 4

Wilfulness is an essential element of the offense of which the defendant stands charged. Evidence showing, or tending to show, lack of wilfulness is a defense.

10] Defendant's Requested Instruction No. 5

He whose conduct is defined as criminal is one who 'wilfully' fails to pay the tax, to make a return, to keep the required records, or to supply the needed information. Congress did not intend that a person by reason of a bona fide misunderstanding as to his liability for the tax, as to his duty to make a return, or as to the adequacy of the records he maintained should become a criminal by his mere failure to measure up to the prescribed standard of conduct.

11] Defendant's Requested Instruction No. 6

Wilfulness is best defined as a state of mind of the taypayer wherein he is fully aware of the existence of a tax obligation to the Government which he seeks to conceal. A wilful evasion of the tax requires an intentional act or omission as compared to one that is accidental, inadvertent or based on lack of understanding. It also requires a specific wrongful intent to conceal an obligation known to exist, as compared to a genuine misunderstanding of what the law requires or a bona fide belief that certain receipts are not taxable. A verdict of guilty cannot be returned unless you find beyond a reasonable doubt that the defendant had such a wilful and wrongful intent or state of mind at the time he filed his returns.

12] Defendant's Requested Instruction No. 7

Wilfully means knowingly, and with a bad heart and a bad intent; it means having the purpose to cheat or defraud or do a wrong in connection with a tax matter. It is not enough if all that is shown is that the defendant was stubborn or stupid, careless, negligent or grossly negligent. A defendant is not wilfully evading a tax if he is careless about keeping his books. He is not wilfully evading a tax if all that is shown is that he has made errors of law. He is not wilfully evading a tax if all that is shown is that he in good faith acted contrary to the regulations laid down by the Internal Revenue Service and the United States Department of the Treasury. He certainly is not wilful if he acts without the advice of a lawyer or an accountant, for there is no requirement that a taxpayer, no matter how large his income, should engage a lawyer or an accountant.

13] Defendant's Requested Instruction No. 8

The wilfulness or a lack thereof of an attempt to evade or defeat a tax is to be determined from all of the evidence, the taxpayer's conduct, combinations of acts and circumstances, or from any conduct, the likely effect of which would be to mislead or conceal.

Factors tending to show conduct of which the likely effect is to mislead or conceal are concealment of assets or sources of income; an elaborate system of suppressed deals, ficticious purchases, or padded operating expenses; keeping a double set of books; making false entries or alterations in books and records with intent to conceal, as distinguished from bona fide corrections; destruction of pertinent books and records; failure to keep books and records; taxpayer's habit of keeping and dealing in large amounts of cash; the making of currency deposits from unidentified sources which are not reflected in the taxpayer's books and records; depositing money in the names of other persons than the taxpayer; buying property, stocks, bonds or other assets in the names of other parties; and placing large amounts of cash in safety deposit boxes.

Conversely, a lack of such conduct on the part of the taxpayer may be considered by you as tending to show a lack of wilfulness or intent to evade taxes.

14] Defendant's Requested Instruction No. 9

If you find that the defendant when he prepared his income tax returns reported the amount of income that he believed he had received, and that he did believe that proceeds received from the sale of houses, subcontract work or any other source were not income to him until he actually withdrew the money for his own use, you must find him not guilty.

15] Defendant's Requested Instruction No. 10

Certain evidence has been introduced by the Government which is largely circumstantial and as such may be used as a basis for your findings only if it measures up to the standards required by law. Such circumstantial evidence must point so unerringly to the guilt of a defendant as to exclude every other reasonable hypothesis, and each of the circumstances must be proved to your satisfaction beyond a reasonable doubt. These circumstances must be consistent with each other and inconsistent with any other hypotheses except the guilt of the defendant.

If, therefore, upon a consideration of all the evidence, you find there exists a reasonable hypothesis which might indicate the defendant's innocence, in the absence of direct evidence satisfying you beyond a reasonable doubt of the defendant's guilt, then I instruct you to find the defendants "not guilty".

16] Defendant's Requested Instruction No. 11

If you believe from the evidence that the Special Agent of the Bureau of Internal Revenue requested of the defendant his books and records and that the Special Agent was told that they would not be given to him by the defendant until defendant's counsel had an opportunity to examine the records and advise him on the matter, then you should not consider these facts as any evidence of a wilful attempt to conceal, or of intent to deceive by the defendant.

Filed June 28, 1956.

183] Plaintiff's Exhibits

Exhibit No. 1 is U. S. Individual Income Tax Return for calendar year 1947, filed by defendant with the Collector of Internal Revenue at Salt Lake City, Utah on March 15, 1948. It lists his occupation as carpenter and in the space for income from "wages, salaries, bonuses, commissions and other compensation" are listed $5000.00 from C. W. Hardy and $1000.00 from "others" for total income of $6000. The return shows no withholding tax withheld from wages. Schedule C on page 2 of said return, referring to Profit (or Loss) from business is left blank. Deductions for church contributions, interest on home indebtedness, taxes on home and sales are listed on page 3 of the return for total of $1040. The tax is computed on page 3, using the total income of $6000 and deductions of $1040, exemptions of $3000, for total tax of $372.40.

Exhibit No. 2 is U. S. Individual Income Tax Return for calendar year 1948, filed by the defendant and his wife with the Collector of Internal Revenue at Salt Lake City, Utah on March 15, 1949. It lists his occupation as carpenter and in the space for income from "wages, salaries, bonuses, commissions and other compensation" are listed $1500.00 from Rex Moss, $2000 from C. W. Hardy, $1000 from Kenneth White and $1450 from "others" for total wages of $5950. The return lists no income tax withheld. Schedule C on page 2 of said return, referring to Profit (or Loss) from business is left blank. Deductions for church contributions, taxes on home and sales, and interest on home indebtedness, are listed on page 3 of the return for a total of $1040. The tax is computed on page 3, using wages of $5950 and deductions of $1040, exemptions of $3600, for a total tax of $217.46.

Exhibit No. 3 is U. S. Individual Income Tax Return for calendar year 1949, filed by the defendant with the Collector of Internal Revenue at Salt Lake City, Utah on March 15, 1950. It lists his occupation as carpenter and in the space for income from "wages, salaries, bonuses, commissions and other compensation" are listed $2100 from Rex Moss, $1850 from First Federal Savings and Loan, $1300 from Kenneth White, and $1485 from Western Loan and Building, for a total of $6735. The return lists no income

tax withheld. Schedule C, referring to Profit (or Loss) from business or profession, on page 2 of the return, is left blank. Deductions for the same items referred to in Exhibits 1 and 2 are listed on page 3 of this return for a total of $1079. The tax is computed on page 3, using total income of $6735, total deductions of $1079, exemptions of $3600, for a total tax of $341.30. The return also shows an audit resulting in an additional assessment of $109.56 assessed on October 25, 1951.

184] Exhibit No. 4 is U. S. Individual Income Tax Return for calendar year 1950, filed by the defendant with the Collector of Internal Revenue at Salt Lake City, Utah on March 15, 1951. It lists his occupation as carpenter and in the space for income from "wages, salaries, bonuses, commissions and other compensation" are listed $2500 from First Federal Savings and Loan, $1250 from Dennis Bowthorpe, and $3225 from Western Loan and Building, for a total of $6975. The return lists no income tax withheld. Separate Schedule C, referring to Profit (or Loss) from business was not included with this return and line on page 2 referring to Schedule C is left blank. Deductions are itemized on page 3 of the return for similar items referred to in Exhibits 1 and 2 above, for a total of $1205.50. The tax is computed on page 3 of the return, using the total income figure of $6975, total deductions of $1205.50, and exemptions of $3000.00 for a total tax of $481.90.

Exhibit No. 5 is U. S. Individual Income Tax Return for calendar year 1951, filed by defendant with the Collector of Internal Revenue at Salt Lake City, Utah, on March 18, 1952. It lists his occupation as carpenter and in the space for income from "wages, salaries, bonuses, commissions and other compensation" are listed $4750 from Western Loan and Building, $1340 from Prudential Federal Savings, $430 from L. H. Schofield, and $615 from Rex Sutherland for a total of $7135. The return lists no income tax withheld. Separate Schedule C Profit (or Loss) from business, was attached to this return; the schedule shows the defendant's name and his wife's name at the top of the schedule as the names under which the income tax return was filed. It lists the nature of business as carpenter and the only figure listed under receipts from business or profession is $7135, which is listed as total receipts from business, as gross profit, and

as net profit. The self-employment tax is computed at the bottom of the Schedule C form, showing net earnings from self-employment as $7135, and a self-employment tax of $81.00. Deductions similar to those listed in Exhibits 1 and 2 are listed on page 3 of this return in a total amount of $1052.88, and the tax is computed on page 3 of the return from the total income figure of $7135, total deductions of $1052.88, and exemptions of $3600 for a total income tax of $506.36.

185] Exhibit No. 6 is U. S. Individual Income Tax Return for the calendar year 1952, filed by the defendant with the Director of Internal Revenue, Salt Lake City, Utah on March 17, 1953. It lists his occupation as carpenter and in the space for income from "wages, salaries, bonuses, commissions and other compensation" are listed $1450 from Western Loan and Building, $1630.37 from Prudential Federal Savings, $2935.46 wages, from McDonald Bros., Inc. with $241.70 income tax withheld on income from McDonald Bros., Inc., only for total income of $6015.83. Separate Schedule C, Profit (or Loss) from business was not filed with this return, although page 3 of such Schedule C, computation of self-employment tax, was attached to the return, showing the defendant's name as name of self-employed person, that the nature of his business was carpenter; that he had net earnings of $3080.37 from self-employment; that he had previously been paid $2935.46 which was subject to withholding for old age and survivor's insurance, and that he had $664.54 subject to self-employment tax after such adjustment; that his self-employment tax was $14.95. Reference to Schedule C, Profit (or Loss) from business, on page 2 of the return was left blank. Deductions for items similar to those referred to in Exhibits 1 and 2 are listed on page 3 of the return for a total of $1080.80. The tax is computed on page 3 of the return on the total income figure of $6015.83 and total deductions of $1080.80, and exemptions of $3000 for a total income tax of $429.58.

Exhibit No. 8 is a cancelled check drawn by Woodrow D. White on the Exchange Place Branch, First Security Bank of Utah, at Salt Lake City, dated November 27, 1951, bearing No. 220, payable to the order of the defendant, in the amount of $1006.80, and showing the indorsements J. S. McDonald and McDonald Bros.

188] Exhibit No. 11 is composed of 3 cancelled checks drawn by Mrs. D. F. Bowthorpe on the First National Bank of Murray, Utah; the first dated October 19, 1950, payable to McDonald Bros. in the amount of $4043.60 and indorsed "McDonald Bros., J. S. McDonald" by Mrs. McDonald; the second check is dated August 25, 1950, payable to McDonald Bros. in the amount of $3500., and indorsed "McDonald Bros., May D. McDonald;" the third check is dated July 18, 1950, payable to McDonald Bros. in the amount of $3500., and indorsed "J. S. McDonald, McDonald Bros." by defendant.

Exhibit No. 12 is composed of two cancelled checks drawn by Rex Sutherland on the Sugarhouse Branch, First Security Bank of Utah, Salt Lake City; the first is dated April 14, 1951, No. 1092, payable to J. S. McDonald, in the amount of $1500., and indorsed "J. S. McDonald, McDonald Bros."; the second check is dated 5-15-52, No. 1268, payable to the order of McDonald Bros. in the amount of $1722.69, and indorsed "McDonald Bros., J. S. McDonald, McDonald Bros. Acct." Both indorsements are by Mrs. McDonald.

Exhibit No. 13 is Sales Invoice of Paulos Auto Company, Magna, Utah, bearing No. 1579, dated March 21, 1949, showing sale to defendant of Chevrolet 1948 H L Cab. 6403, New Truck, for a total price of $3186.78, which was the total cash price. The invoice shows settlement as cash on delivery of $3186.78.

Exhibit No. 14 is composed of 3 cancelled checks drawn by F. H. Schofield on the First National Bank of Murray, Utah; the first is dated January 9, 1951, payable to the order of defendant in the amount of $1500, and indorsed J. S. McDonald, McDonald Bros.; the second is dated February 23, 1951, payable to the order of defendant in the amount of $2500., indorsed J. S. McDonald, McDonald Bros.; the third is dated May 19, 1952, payable to McDonald Bros., Inc.; in the amount of $2562.50, and indorsed McDonald Bros., Inc. by J. S. McDonald, McDonald Bros. Acct. All indorsements are by Mrs. McDonald.

Exhibit No. 15 is cancelled check drawn by A.E. Jarvis on the Walker Bank and Trust Company, Salt Lake City, dated January 9,1951, payable to McDonald Bros. Contractors in the amount of $720., bearing No. 62, and notation "Garage acct.

in full", and indorsed "J. S. McDonald, McDonald Bros." by Mrs. McDonald.

Exhibit No. 16 is composed of 2 cancelled checks drawn by State Savings and Loan Association on the Utah First National Bank of Salt Lake City; the first is dated April 9, 1951 and bears No. 112, payable to the order of LeGrand G. McDonald and defendant in the amount of $2500., indorsed "LeGrand G. McDonald, J. S. McDonald, McDonald Bros."; the second check is dated June 25, 1951 and bears No. 1187, payable to the order of LeGrand McDonald and defendant in the amount of $1500., and is indorsed "LeGrand McDonald, J. S. McDonald, McDonald Bros. Acct." The endorsements of defendant are by Mrs. McDonald.

Exhibit No. 17 is composed of two ledger sheets of Savings Account No. 6449 of J. S. or Stevenson McDonald at the State Savings and Loan Association, covering the years 1949 through 1951 and showing a balance in said account on December 31, 1948 of $462.80; on December 31, 1949 of $892.63; on December 31, 1950 of $1402.54; and on December 31, 1951 of $579.93. Withdrawals include one of $1444.22 on 1/31/51.

Exhibit No. 18 is composed of ledger sheets of the State Savings and Loan Association with regard to construction loans made to the defendant and his brother Stevenson. Loan No. 2228, set up on 3/11/47 for $8,000, showed a balance due to the State Savings and Loan Association as of December 31, 1948 of $7713.71; as of December 31, 1949 of $7439.09; as of December 31, 1950 of $7171.40; and no remaining balance on December 31, 1951 as the loan had been paid during that year.

As to Loan No. 2229, set up on 3/11/47 for $8000, it shows a balance due and owing to the State Savings and Loan Association on December 31, 1948 of $7732.36; as of December 31, 1949 of $7458.58; on December 31, 1950 of $7191.89; and no balance on December 31, 1951 as the loan had been paid off during that year. A payment on this account of $1444.22 is shown "from Sav" on 1/31/51

Loan No. 2477, set up 3/19/48 for $8500, showed a balance due to State Savings and Loan Association on December

31, 1948 of $8242.30; on December 31, 1949 of $7805.07; on December 31, 1950 of $7378.91; on December 31, 1951 no balance, as the loan was paid off during that year.

Of payments made, part went to taxes, part to interest and part to principle.

Exhibit No. 19 is composed of ledger sheets of construction loans obtained by defendant and his brother Stevenson from State Savings and Loan Association. Loan No. 2234 shows that the loan was originally made in the amount of $11,500. in March of 1947. The ledger sheet shows that on December 31, 1948 there was a balance due of $9347.10; on December 31, 1949 there was a balance due of $7215.82; on December 31, 1950 there was a balance due of $5132.80; on December 31, 1951 there was a balance due of $2932.29. Monthly payments made were applied to the payment of interest and principal.

Exhibit No. 20 is composed of 5 financial statements presented by the defendant to lending agencies in connection with his securing loans from said agencies. The first financial statement is headed "Individual Statement" from McDonald Bros., whose business is listed as Building Contractors, and was presented to the First Security Bank, Sugarhouse Branch, Salt Lake City, and is dated December 31, 1951 and signed by the defendant. It shows:

190] **Assets**

Cash on hand (3 banks)	$ 12,731.56
Contracts receivable ..	31,937.00
Accts. receivable	4,521.00
Building materials....	10,250.00
Equity in 80 lots Morningside and East Morningside Heights .	60,000.00
Real estate	68,500.00
Real estate sold on contract	233,357.39
56 sh. Big Cottonwood & Upper Canal Irrigation Co.	3,360.00
61 sh. Holladay Water Company	15,250.00

Liabilities

Notes payable to banks	$5,000.00
Current monthly accts. payable	12,250.00
Mortgages	10,654.09
Mortgages and real estate sold on contracts	162,279.25
Tractor	1,613.52
1949 International flat bed truck	1,242.88
1951 International pick-up truck	1,689.48
Total Liabilities ...	$194,729.22
Net Worth	$252,677.73
Total	$447,406.95

Assets (continued)

International tractor,	$ 2,500.00
1949 International flat bed truck	2,500.00
1951 International pick-up truck	2,500.00
Total assets	$447,406.95

In answer to questions concerning life insurance there was indicated that $10,000 was carried payable to "wife and children". Under number of dependents was listed the figure "5", and under the heading Age was listed "Wife - 20 - 16- 15- 11". Under the description of real estate heading there is listed "38 acres at 5401 Holladay Boulevard in names of J. S. and Stevenson McDonald, valued at $40,000.00; home of J. S. McDonald at 1990 East 4700 South, valued at $12,000.00; and home of Stevenson McDonald at 5401 Holladay Boulevard, valued at $16,500.00. Detailed schedules were included for the items "Contracts Receivable", "Real Estate Sold on Contract" and "Mortgages on Real Estate Sold on Contract".

The second financial statement, bearing date April 10, 1948, shows name as J. S. McDonald, dba McDonald Bros. Business is listed as Contractor and Builder. This statement was presented to the First National Bank of Salt Lake City and shows total assets of $136,908.15; $30,000 of which was of 1/2 interest in 38 acres and $10,000 in own home; total liabilities of $78,250.00, and net worth of $58,658.15. This statement is signed by the defendant. There is noted thereon "net income 1947, $7000.00".

The third financial statement, entitled "Personal Statement", was given to the First Security Bank of Utah, Sugar House Branch at Salt Lake City, dated August 30, 1950. It shows total assets of $205,237.94 of which $39,750 is shown as real estate but only $29,500 is listed in Schedule; total liabilities of $103,368.57; and net worth of $101,869.37. This also is signed by the defendant.

The fourth financial statement, entitled "Individual Statement" from McDonald Bros., whose business is given as

building contractors, to First Security Bank, Sugar House Branch, dated July 27, 1951, shows total assets of $268,823.44; total liabilities of $111,304.48; net worth of $157,518.96. This statement also is signed by the defendant. Assets listed include $54,000 for 38 acres on Holladay Blvd., including two homes owned by J. S. and Stevenson McDonald and $12,000 for defendant's home. Assets also listed water stock valued at $20,160. Also "annual salary or income from business" is shown as $14,000.00.

191] The fifth statement is an Individual Financial Statement from J. S. McDonald, showing business as Contractor, to First Security Bank of Utah, dated March 17, 1949. It shows:

Assets		Liabilities	
Cash on hand	$1,025.00	Construction materials Vaughn Subdivision	$2,000.00
Savings accounts	518.00	Mortgages	20,992.70
Notes receivable	2,400.00	Mortgages per real estate sold on contract	77,217.32
Cash, Western Loan & Bldg. Co.	10,900.00 & 1,600.00	Total Liabilities	$100,210.02
Real Estate	43,500.00	Net Worth	$ 73,883.56
Real Estate sold on contracts	101,550.58		
Office furniture & equipment	3,000.00	Total	$174,093.58
1947 Oldsmobile	1,000.00		
36 sh. Holladay Water Company	5,400.00		
32 sh. Big Cottonwood Upper Canal Irrigation Co.	3,200.00		
Total Assets	$174,093.58		

This financial statement, under Schedule of Real Estate, shows one-half interest 38 acres at 5401 Holladay Boulevard, $6500.00; J. S. McDonald home at 1990 East 47th South, $10,000.00; 9 lots in Vaughn Sub-division, J.S. McDonald, $17,000.00; and property at 2540 East 2900 South, J. S. McDonald, $10,000.00. Detailed schedules on "Real Estate sold on Contract" and "Mortgages on Real Estate Sold on Contract" are included.

This statement also was signed by the defendant.

Exhibit No. 21 is composed of photostat copies of the ledger sheets of the First Security Bank, Sugar House Branch, Salt Lake City, Utah, referring to the two checking accounts, one in the name of McDonald Bros. and the other in the name of J. S. or May D. McDonald, both showing the address of 1990 East 47 South, Salt Lake City. The McDonald Bros. account shows credit balances as follows: Dec. 31, 1948, $2012.57; Dec. 31, 1949, $22,436.87; Dec. 31, 1950, $10,014.45; Dec. 31, 1951, $4235.64. The J.S. or May D. McDonald account shows balances as follows: Dec. 31, 1948, $136.16; Dec. 31, 1949, $136.75; Dec. 31, 1950, $15.51; Dec. 31, 1951, $207.20. The ledger sheets for these two accounts for the month of January 1952 were included in the exhibit, such ledger sheets showing the checks paid out and the deposits made to the accounts during such month, as well as during the 3 year periods referred to.

Exhibit No. 22 is photostat copy of signature card furnished by the First Security Bank, Sugar House Branch, Salt Lake City, and bearing the former name of such bank, to wit, The First National Bank of Salt Lake City, Utah, which card is dated March 19, 1947, showing the name of the account as McDonald Bros. and the address 1990 East 47 South, and bearing the written signature J. S. McDonald and the printed name of Stevenson McDonald as "Partners or owners" and the names of May D. McDonald and Elizabeth McDonald as additional signatures authorized." It further shows the business is unincorporated and wholly owned by "the undersigned 2 persons".

192] Exhibit No. 23 is ledger card of the First Security Bank, Sugar House Branch, regarding loans made to J. S. McDonald for the period beginning April 14, 1948 through April 1,1953. The ledger card shows that on December 31, 1948 the defendant owed to the said bank the sum of $1500; on Dec. 31, 1949, $2500; on Dec. 31, 1950, no balance; Dec. 31, 1951, $5000.

Exhibit No. 24 consists of 5 cancelled checks drawn by M. Kenneth White on the First Security Bank of Utah, Exchange Place Branch, Salt Lake City, all payable to the

defendant, as follows; Check No. 72, dated Jan. 12, 1949, for $418.; No. 202, dated Mar. 9, 1949, $500.; No. 377, dated May 11, 1949 for $450.; No. 451, dated June 1, 1949, for $550.; and No. 12, dated July 23, 1949 for $820. The first two were endorsed by defendant, the other three by Mrs. McDonald.

Exhibit No. 25 is folder of William Thayne, Real Estate Agent, regarding sale by J. S. McDonald and wife to Richard O. Jorgenson and wife of Lot 30, Block 2, Veteran Heights, in Salt Lake County. The file, which consists of commission sheet, sellers' statement of account, buyers' statement of account, uniform real estate contract, and copy of warranty deed, discloses that this property was sold by the defendant and his wife under uniform real estate contract dated November 26, 1948 for the sum of $10,500., with down payment of $2550., of which $450 went for commission, $704.99 was paid in cash and balance was equity in 1233 Roosevelt, receipt of which was acknowledged, with contract balance of $7950.

Exhibit No. 26 is file of William Thayne, Real Estate Agent, covering sale by defendant and wife to L. H. Ryan and wife of Lot 29, Block 2, Veteran Heights, and Lot 89, amended plat of Lakeview Heights, Block 4. Such file includes commission statement, earnest money receipt and agreement dated November 23, 1948, sellers' statement of account, buyers' statement of account, miscellaneous notes, and copy of uniform real estate contract. The contract is dated November 26, 1948 and shows the sales price to be $10,525., with $1000. as down payment, $525 of which went for commission and $475 due seller, receipt of which was acknowledged, with contract balance of $9525.

Exhibit No. 27 is original uniform real estate contract dated March 16, 1951 between M. Kenneth White and wife, as sellers, and defendant as buyer, with regard to Lots 1, 2, 3, 4, 5, 20, 21, 22, 23, 27, 28, 29, 30, 33, 34, 35, 36, 37, 38 and 39 in East Morningside Heights. The purchase price is set at $23,000., $2000 is listed as the down payment, receipt of which was acknowledged. The balance was to be paid on or before March 15, 1952. For each payment of $1050. in addition to the down payment, sellers agreed to convey one lot as designated by the buyer. Attached to said

uniform real estate contract was an agreement signed by M. Kenneth White and the defendant, dated May ___, 1952 with regard to the said lots in East Morningside Heights, referred to in the uniform real estate contract, wherein the defendant agreed to construct and install curb and guttering for the sellers, the consideration for which was to be applied upon the purchase price of the lots, as set forth in the uniform sales contract.

Exhibit No. 28 consists of ledger cards of the Prudential Federal Savings and Loan Association of Salt Lake City with regard to collections made by such Association for the defendant on contracts on properties that the defendant had sold. Two ledger sheets, bearing the name of J. Alvin and Myrine Metcalf, show payments commenced 9/25/47 and a balance due to the defendant from the Metcalfs on Dec. 31, 1948 of $8719.94; on Dec. 31, 1949, $8594.34; on Dec. 31, 1950, $8322.66; on Dec. 31, 1951, $8300.49. Payments collected were to be credited to U-2250 with the balance, less collection fee, to Savings Account #15896.

The ledger sheet showing the name of Charles L. and Maxine B. Maxwell, shows payments commenced 9/10/47 and a balance due to the defendant by the Maxwells on Dec. 31, 1948 of $9002.87; on Dec. 31, 1949, $8720.17; and on Dec. 31, 1950, $8285.90. Payments were to be credited to U-2251.

The ledger sheets bearing name of Morris E. and Norma W. Rasmussen shows payments commenced 11/1/47 and a balance due to defendant on Dec. 31, 1948 of $9551.97; on Dec. 31, 1949, $9269.41; Dec. 31, 1950, $8773.68; and on Dec. 31, 1951, $8518.45. Payments were to be credited to U-2252 with balance to U 2250.

The ledger sheets bearing name of David and Arline Turner show payments began 3/6/48 and a balance due to the defendant on Dec. 31, 1948 of $7883.70; Dec. 31, 1949, $7583.06; Dec. 31, 1950, $7273.20; Dec. 31, 1951, $6985.96. Payments were to be applied to U-2371 with balance to Loan #U 2250. All cards show that part of each monthly payment is credited to interest as well as to principal.

Exhibit No. 29 is composed of photostatic copies of

ledger sheets of savings or share account of the defendant and his wife at the Prudential Federal Savings and Loan Association in Salt Lake City, Utah. The ledger sheets show that there was no balance on Dec. 31, 1948; on Dec. 31, 1949 the balance was $236.49; on Dec. 31, 1950 the balance was $355.52; on Dec. 31, 1951 the balance was $388.39.

197] * * * * * *

Exhibit No. 35 consists of financial statements, as follows:

One dated February 3, 1948, signed by the defendant, reported under his own name, and showing his business as a General Contractor, and indicating as follows:

Assets		Liabilities	
Cash on hand	$ 5000.00	Mortgages	$60,100.00
1/2 interest in 72 sh. Holladay Water Company stock	5000.00	Net Worth	$54,550.00
1/2 int. in 65 sh. Upper Canal Irrigation Co. stock	3250.00	Total	$114,650.00
Real Estate	101,400.00		
Total Assets	$114,650.00		

Real estate listed included a 1/2 interest in 38 acres and two homes at 5401 Holladay Blvd., valued at $29,000.

Financial Statement in name of defendant and signed by him under date of Jan. 17, 1949, showing as follows:

Assets		Liabilities	
Cash on hand	$ 8,000.00	Notes payable to banks, unsecured	$1,500.00
Securities	35,545.00	Accounts payable	11,500.00
Real estate owned ..	89,140.00	Real estate mortgages payable	49,750.00
Automobiles	1,800.00		
Life ins., cash value	1,000.00		
Lumber & Hardware ..	2,000.00		
		Total Liabilities	$62,750.00
Total Assets	$137,485.00	Net Worth	$74,735.00
		Total	$137,485.00

198] Under the schedules of this Statement defendant lists one-half interest in 72 shares Holladay Water stock at $6000.00; 1/2 interest in 65 shares of Upper Canal Irrigation Company at $3250.00; and amounts receivable on seven houses, $26,295., for the total of the figure labeled as "securities" under Assets. Real estate owned was not separately listed in Schedules. Income on annual basis is listed as "net from business, $6000.00".

Financial Statement dated Dec. 31, 1951, indicated as signed by McDonald Bros., by J. S. McDonald, and made in the name of McDonald Bros., with business "Building Contractors". Such statement is made on a form of the Western Loan and Building Company and indicates on its face that it is a certified true copy of an original, which certificate is signed by R. W. Brewer, Loan Supervisor. This statement is identical to the first financial statement described in Plaintiff's Exhibit No. 20, except there is left out of the assets therein listed the item Contracts Receivable, in the amount of $31,937. Thus the total assets in this financial statement, part of Exhibit 35, are $415,469.95, and net worth is $220,740.73. Total liabilities are constant at $194,729.22. "Real Estate sold on Contract" and "Mortgages on Real Estate sold on Contract" are detailed in schedules.

* * * * *

Exhibit No. 37 is photostat copy of ledger sheet of the savings account of the defendant and his wife at the Western Loan and Building Company in Salt Lake City. The said ledger sheet indicates there was a balance of $1.22 in this account on Jan. 1, 1951 and a balance of $719.14 in this account on Dec. 31, 1951.

* * * * *

207] Exhibit No. 44 is composed of two original carbon copies of invoices of the International Harvestor Company showing sale to the defendant on March 20, 1951 of Model L-161 International Harvestor Motor Truck, motor number 33664 with listed extras for a total price including taxes of $4,010.82 with trade-in of one 1942 Chevrolet truck, motor number BG 252510 for $150.82. The

total amount due after deduction of the amount of trade-in was $3,860.00. That invoice bears number 005695.

The second invoice shows sale to the defendant on October 12, 1951 of Model L-132 International Harvestor Motor Truck, Motor Number 115146, together with various listed extras for a total including taxes of $2,250.00. This invoice bears number 006451. Both invoices disclose that the settlements were for cash.

208] Exhibit No. 45 is records of the Zions Benefit Building Society of Salt Lake City referring to loan made to the defendant on property at 1750 Windsor Street in Salt Lake City. Ledger sheet bearing number 9023 shows that the loan was for $5,500.00 dated September 24, 1949. The principal balance due from defendant as of December 31, 1949 was $5,421.55; as of December 31, 1950 was $5,018.27; and as of December 31, 1951 was $4,776.64. The ledger sheet disclosed that Reed M. Giles assumed a contract on this property on June 2, 1950. Payments on loan were applied to principal and interest. On the application for this loan, dated Sept. 8, 1949, defendant stated his income was $5,000 per year.

Exhibit No. 46 is records of Zions Benefit Building Society of Salt Lake City with regard to loan made to the defendant on property at 779 East 21st South, Salt Lake City. Ledger sheet number 9003 discloses the amount of the loan was $4,500.00 dated September 7, 1949. There is an indication on the ledger sheet that deed was to be executed to Birnell Olsen and his wife. No date appears, however, as to transfer of interest to the Olsens. The balance due on this obligation as of December 31, 1949 was $4,539.30; as of December 31, 1950 was $4,235.66 and as of December 31, 1951 was $3,925.02. Payments on loan were applied to principal and interest. On the application for this loan, dated 8/24/49, McDonald stated his annual income was $5,000 per year.

Exhibit No. 47 is composed of miscellaneous documents with regard to three mortgage loans made by the First Security Bank of Utah to the defendant. The first document is entitled "Lien Certificate" prepared by the Salt Lake County Recorder showing a chattel mortgage executed by the defendant dated November 28, 1950 filed December 2, 1950 in the

amount of $3,262.56 under file number 79241 with mortgage shown as First Security Bank of Utah and referring to tractor, etc. as the property covered by the mortgage. Attached to such Lien Certificate is duplicate original chattel mortgage dated November 28, 1950 executed by the defendant and mortgaging to the First Security Bank of Utah one International Crawler Tractor and one Bucyrus Erie Dozer shovel for the sum of $3,262.56.

209] The second set of documents is composed of loan information sheet referring to Account Number AT-12-12278 for loan dated March 31, 1951 in the amount of $3,227.07 gross, made in the name of defendant and referring to International Truck costing $4,100.00. Attached to such loan information sheet is Lien Certificate prepared by the Salt Lake County Recorder showing chattel mortgage dated November 28, 1950 was filed in such office on December 2, 1950 in the amount of $3,262.56 under file number 79241, with mortgagor shown as the defendant and mortgagee as the First Security Bank of Utah, and the property covered in the mortgage is labeled as equipment. Attached to these documents is sheet entitled "Purcnaser's Statement" in defendant's name dated March 31, 1951 on the work sheet part of which it lists the defendant's name as the borrower and lists as security a new International Truck, Model 1951, with cash selling price of $4,100.00, down payment of $1,100.00, cash balance due of $3,000.00, time charges of $227.04, time payment balance total of $3,227.04. Attached to these documents is copy of the letter addressed by the First Security Bank of Utah, Sugarhouse Branch, to the Utah State Tax Commission dated April 18, 1951 forwarding registration and chattel mortgage documents with regard to the referred to transaction.

The third set of documents includes loan information sheet in the name of defendant showing date of loan as October 15, 1951, Account Number AT-29-13596 in the gross amount of $2,027.40. Purchaser's Statement and work sheet attached in the name of defendant shows security as a new International Truck, Model 1951, amount of loan as $1,860.00 with time charges of $167.40 or a total of $2,027.40. Attached to these documents is financial statement signed by the defendant dated July 27, 1951 which is identical with the fourth financial statement in Exhibit 20..

210] Exhibit No. 48 is the file of the Brockbank Realty Company with regard to sale to David Turner of property at 2396 East 29th South by the defendant. The file includes duplicate original Uniform Real Estate contract dated January 30, 1948 showing the sales price of $9,650.00, down payment of $1,500.00, with monthly payments of $64.38 to commence on March 1, 1948. Attached are Seller's Statement of Account, Buyer's Statement of Account, and original Earnest Money Receipt and Agreement dated January 13, 1948.

Exhibit No. 49 is the file of the Brockbank Realty Company with regard to sale of the property at 5385 Holladay Blvd. by the defendant to W. A. Thomas. Included in such file is copy of Uniform Real Estate contract dated August 2, 1948 showing sale by the defendant and his wife and his brother, Stevenson McDonald, to W. Alvin Thomas and his wife and George R. Grundy and wife of said premises together with two shares of Holladay Water Stock at a purchase price of $15,000.00. Down payment of $2,700.00 is acknowledged and $500.00 credit was allowed on finish carpentry work. The balance was to be paid in monthly payments of $100.00 commencing on the 3rd day of August, 1948. Also included in said file are Buyer's Statement of Account and miscellaneous other papers, including carbon copy of Earnest Money Receipt and Agreement referring to said sale.

Exhibit No. 50 is the file of the Brockbank Realty Company with regard to the sale by defendant to William Thomas Horner of property at 2465 East 29th South. Included in the file is copy of Uniform Real Estate contract dated August 12, 1948 showing sale by defendant and wife and his brother, Stevenson McDonald, to William Thomas Horner and his wife of said premises at a purchase price of $9,500.00 with down payment of $1,150.00 acknowledged, together with a $200.00 credit on painting and interior decorating. The balance was to be paid at the rate of $55.00 or more per month, commencing on September 12, 1948. Also included in said file are Seller's and Buyer's Statements of Account and copies of Earnest Money Receipt and Agreement dated February 20, 1948.

* * * * *

211] Exhibit No. 52 is photostatic copy of accountant's working papers entitled "McDonald Brothers Partnership for the year 1952, Analysis of Work in Progress." Listed in such analysis are checks commencing January 1, 1952 showing payee, check number, the amount of the check, and then a breakdown as to withholding tax, Federal Old Age Security, work applied on contract, work in progress as to materials, labor, sub-contract, and gas, oil and miscellaneous.

The first three sheets of such analysis cover checks during the month of January, 1952. The fourth sheet which is labeled with regard to the year 1952 shows further miscellaneous expenditures for February, 1952, March, April, May and June, 1954. This would appear to be a clerical error, however, and the reference would be with regard to March, April, May and June of 1952.

* * * * *

212] Exhibit No. 54 is as follows:
"Joseph S. McDonald, Statement of Net Worth

	As of December 31	
Assets:	1948	1951
Checking Accounts:		
1. McDonald Bros.	$ 2,012.57	$ 1,564.43
2. J. S. or May D. McDonald	136.16	207.20
Share Accounts:		
3. State Savings & Loan (50%)	231.40	289.96
4. Western Loan & Building	-0-	776.41
5. Prudential Federal		388.39
6. Due from American Housing on 1948 sale	3,771.65	
7. Building Materials	2,000.00	5,000.00
8. Holladay Water Stock	6,000.00	5,175.00
9. Upper Canal Water Stock	4,200.00	4,000.00
10. Automobiles	1,800.00	716.67
11. Construction Equipment	3,000.00	9,703.95
12. Notes Receivable	2,400.00	34,219.31
13. Contracts Receivable	140,861.24	262,538.71
14. Real Estate	68,955.00	129,771.57
Total Assets	$235,368.02	454,351.60

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	Liabilities		
15.	Mortgage Loans	$129,478.13	$246,761.39
16.	Accounts Payable	2,000.00	18,333.87
17.	Payroll Taxes due		504.98
	Notes Payable:		
18.	First Security Bank	1,500.00	9,993.20
	Continental Bank		85.88
	Wayne Mason		1,400.00
	Total Liabilities	$132,978.13	$277,079.32
	Net Worth	102,389.89	177,272.28
	Total	$235,368.02	$454,351.60

213 Exhibit No. 55 is as follows:

J. S. McDonald - Computation of Income

Net Worth, December 31, 1951			$177,272.28
Net Worth, January 1, 1949			102,389.89
Increase in Net Worth			$ 74,882.39
Personal Deductions Claimed -	1949	$1,296.46	
	1950	1,546.80	
	1951	1,634.38	4,477.64
Corrected Adjusted Gross Income for three year period without consideration of living costs			$79,360.03

Income from sources other than mortgage loan companies per returns:

1949 - Kenneth White	$1,300.00		
Rex Moss	2,100.00	3,400.00	
1950 - Dennis Bowthorpe		1,250.00	
1951 - L. H. Schofield	430.00		
Rex Sutherland	615.00	1,045.00	
Total			$ 5,695.00

Balance of income allocated in proportion to gross receipts from sales $ 73,665.03

Year	Gross Sales	Percent of Total	Net Income from Sales	Income from Contracts	Adjusted Gross Income
1949	$293,481.86	29.38%	$21,642.78	$3,400.00	$25,042.78
1950	363,704.00	36.41%	26,821.44	1,250.00	28,071.44
1951	341,722.00	34.21%	25,200.81	1,045.00	26,245.81
Total	$998,907.86	100%	$73,665.03	$5,695.00	$79,360.03

Percent of profit on sales $\frac{73,665.03}{998,907.86} = 7.374557\%$

214] Exhibit No. 56 is a pamphlet of official instructions prepared and furnished by the Internal Revenue Service entitled "Helpful Information on How to Prepare Your United States Income Tax Return on Form 1040 for 1949".

Exhibit No. 57 is a pamphlet of official instructions prepared and furnished by the Internal Revenue Service entitled "Helpful Information on How to Prepare Your United States Income Tax Return on Form 1040 for 1950".

Exhibit No. 58 is a pamphlet of official instructions prepared and furnished by the Internal Revenue Service entitled "Helpful Information on How to Prepare Your United States Income Tax Return on Form 1040 for 1951".

Each of the three pamphlets, Exhibits 56 through 58, include tax rate schedules on the last sheet thereof and include general statements with regard to preparation of income tax returns, including statements with regard to exemptions, how to report income, various kinds of income to be reported, how to claim non-business deductions, and how to figure the tax.

215] Defendant's Exhibits.

Exhibit A:

Four cancelled checks drawn on the J.S. and May McDonald

account at the First Security Bank of Utah, Sugarhouse Branch, each made payable to the Collector of Internal Revenue, each signed by May D. McDonald, and each bearing the date, amount and a stamped number thereon as follows:

Number	Date	Amount
2027865	3/14/50	$341.30
2015914	3/14/51	$481.90
OF 57603	3/13/52	$587.36
10-555907	10/17/51	$109.56

Exhibit B:

Eighteen cancelled checks drawn on the McDonald Brothers account at the First Security Bank of Utah, Sugarhouse Branch, each of which is made payable to the Collector of Internal Revenue, each signed by May D. McDonald and each bearing the date, amount and a stamped number thereon as follows:

Number	Date	Amount
5-103528	4/30/49	$ 62.46
5-102959	4/30/49	$ 31.25
8-101068	7/29/45	$115.64
8-102874	7/29/49	$ 57.82
None	10/31/49	$811.47
1-102353	1/9/50	$132.74
1-102066	1/9/50	$283.40
5-101878	4/27/50	$282.22
8-101098	7/26/50	$433.98
11-101238	10/30/50	$460.93
2-104681	1/31/51	$847.09
5-102325	4/30/51	$592.77
8-100787	7/30/51	$636.91
11-102105	10/30/51	$647.74
2-104771	1/31/52	$504.98

Exhibit C:

Employer's Tax Returns and Quarterly Return of Income Tax withheld on Wages for each of the four quarters of 1949, each signed "J. S. McDonald", owner, each bearing serial

number 87-0152304, and each bearing a number and amount corresponding to the numbers and amounts set forth in the first seven checks listed in Exhibit B except the returns for the quarter ending September 30, 1949, in which case the totals on the two returns are $109.06 and $702.41 (see check above for $811.47). Attached to the Quarterly Return of Income Tax Withheld on Wages for said 3rd quarter of 1949 is a document which reads as follows:

October 27, 1949

216]

J. S. McDonald, 1990 East 47th South, Salt Lake City, Utah. 87-0152304

Dear Sir: The adjustment for preceeding quarters of calendar year, items entered represent 1% of wages paid instead of total amounts of taxes withheld, these were made in error.

	Reported	Should have been
March 31st	$31.25	$114.00
June 30th	57.82	331.60
Totals	89.07	445.60
	Amount Due	356.53

Sept. 30th, 1949
Report

J. S. McDonald"

Also, Employers Quarterly Federal Tax Returns for each of the quarters of 1950 and 1951 signed "J. S. McDonald" owner, Identification #870152304, with amounts and numbers stamped thereon corresponding to the last 8 checks listed in Exhibit B.

Exhibit D.

Employer's application for Identification Number filed by J. S. McDonald on April 15, 1941, and Notice to J. S. McDonald that on April 24, 1941, Identification number 87-0152304 was assigned to him.

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Exhibit E.

Photostatic copies of accounting work papers consisting of the following:

1. Taxable profit and loss statement of McDonald Brothers partnership for six months ended June 30, 1952, showing a net partnership profit of $5,372.06, $2,686.03 of which was chargeable to J. S. McDonald and balance to Stevenson McDonald. The computation took into account receipts from property sales, labor contracts, 1951 deferred sales, interest and miscellaneous income. Attached to the statement was a schedule and working sheet showing a statement of property sales for six months ending June 30, 1952, and also receipts for work and labor and a computation of profits in prior year sales. Cost of sales were figured at 15% of gross profit & work and labor at 10%.

217] 2. A statement of profit and loss for the year ended December 31, 1951, showing a net profit of $21,017.77, $10,508.89 of which was J. S. McDonald's share. The statement took into account property sales, labor contracts, interest received and miscellaneous sales. Attached thereto was an analysis of properties sold and work and labor contracts for 1951 showing date of sale, name, address, sales price, cost (85% of sales), sales profit, sales commission, net profit, down payment, payments on contracts, contract balances at end of year, total payments in 1951, percentage of profit, profit realized and unrealized. 42 names are listed thereon. Also 14 pages of work sheets showing analysis of debits and expenditures.

Exhibit F.

A statement of McDonald Bros. Contractors, to Rex Moss showing balance due as of Dec. 15, 1949 of $1,381.50 less $180.00 for patrol work as shown on the bottom of said Exhibit leaving a balance due of $1,201.50.

Exhibit G.

A statement from McDonald Bros. dated Nov. 1949 to Rex Moss showing amount due for 980 feet bond beam of $2,205.00 less $75.00 and $748.50 for shoes, panels and ties in amounts

and numbers listed thereon, leaving a balance due of $1,381.50.

Exhibit H

Two cancelled checks of McDonald Bros. drawn on the First Security Bank of Utah, Sugarhouse Branch, each made payable to Paulos Auto Co. one dated 3/18/49 for $100.00, signed by May D. McDonald and one dated 3/31/49 for $3,133.66 signed by J.S. McDonald.

Exhibit I.

218] Bank statements and cancelled checks for each month of 1949 on the personal account of May D or J. S. McDonald on the First Security Bank of Utah, Sugarhouse Branch. The bank statements show a beginning balance of $136.16 as of Dec. 31, 1948 and an ending balance of $136.75 as of December 31, 1949. Checks written included checks readily identifiable as having been issued for house payment, groceries, utilities, church donations, doctors, insurance, clothing, state taxes, and other miscellaneous matters. Personal deductions claimed on the 1949 income tax return are supported by checks drawn on this account. Almost all of the checks written were signed by May D. McDonald (For analysis of deposits see Exhibit 00)

Exhibit J.

Bank statements and cancelled checks, as in Exhibit I, for the year 1950, with an ending balance of $15.51 as of 12/31/50. Checks were written for similar purposes as in Exhibit I and almost all were signed by May D. McDonald. Personal deductions claimed on the 1950 income tax return are supported by checks drawn on this account. (For analysis of deposits see Exhibit 00)

Exhibit K.

Bank statements and cancelled checks, as in Exhibit I, for the year 1951, with an ending balance of $207.20 as of 12/31/51. Checks were written for similar purposes as in Exhibit I and almost all were signed by May D. McDonald. Personal deductions claimed on the 1951 income tax return are

supported by checks drawn on this account. (For analysis of deposits, see Exhibit OO)

Exhibit L.

The bank statements of the McDonald Brothers account at the First Security Bank of Utah, Sugarhouse Branch, for the years 1949, 1950 and 1951 and first six months of 1952 with the following year ending balances:

12/31/48	$2,012.57
12/31/49	22,436.87
12/31/50	10,014.45
12/31/51	4,235.64
6/30/52	3,757.04

219] (For analysis of deposits see Exhibit PP)

Exhibit M.

Five cancelled checks on McDonald Bros. account at First Security Bank of Utah, Sugarhouse branch, all made payable to Ken White or Kenneth White in the amounts and on the dates as follows:

2/7/51	$1,000.00
3/21/51	2,000.00
7/27/51	3,500.00
8/15/51	19,500.00
11/27/51	24,011.35

Exhibit N.

A cancelled check drawn on McDonald Bros. account at First Security Bank of Utah, Sugarhouse Branch, dated Nov. 30, 1951 and made payable to Security Title Co. in the sum of $1,512.80

Exhibit O.

Document entitled "Mortgagors Statement" signed by J.S. McDonald and certifying that the statement above is a true and correct copy of his financial statement as of April 5, 1950. The statement includes the following entry:

"Annual Income $6,000.00
Base Pay of Mortgagor

Exhibit P.

Ledger sheets of Western Loan and Building Co. covering all construction loars made to J.S. McDonald and Evelyn May McDonald during the years 1949, 1950 and 1951, reflecting, among, other things, the disbursements made to the McDonalds on each loan. The disbursements vary in amounts on each loan with approximately four draws on each loan being made. Each and every disbursement of the loans made to the McDonalds were entered in the Receipts and Disbursement record maintained by the McDonalds (Exhibit ii). The loans vary in amount from $6,000.00 to approximately $9,100.00. Numerous debits against each loan, in addition to the draws made by the McDonalds, appear on the ledger sheets of each loan.

220] Exhibit Q.

Three cancelled checks on McDonald Bros. account at First Security Bank all made payable to International Harvester Co. One dated March 15, 1950 was in the sum of $1,450.00; one dated March 28, 1951 was for $3,860.00; and one dated Oct. 17, 1951 was for $2,250.00.

Exhibit R.

Three deposit slips covering deposits to the McDonald Bros. account at the First Security Bank, Sugarhouse Branch. One was for a deposit on February 10, 1949 for $2,844.28, and included a $14.00 check drawn on "31-65" (Bank number of the First Security Bank, Sugarhouse Branch)" The second was for a deposit on Dec. 12, 1950 for $1,450.92 and included a $15.92 check drawn on "31-65". The third was for a deposit on May 12, 1951 for $282.08 and included a $117.58 check drawn on"31-65".

Exhibit S.

Five applications for mortgage loans filed by J.S. and Evelyn May McDonald with the Prudential Insurance Co. of America on five lots in Vaughn Subdivision (Grandview

Circle), two of which are dated 2/21/49, one 4/11/49 and two 6/20/49. Each of the applications show McDonald's occupation as a "building contractor" and his annual income as $6,000.00.

Exhibit T.

This Exhibit consists of an analysis of receipts for the first six months of 1952. It is in the handwriting of Evelyn May McDonald and shows the date received, the name of the person from whom it was received and the amount. The amounts are then spread to show the nature of the receipts with a breakdown into the following categories:

221] 1. Credits: Insurance and tax reserve, mortgages payable - construction; interest, contracts payable, social security taxes, miscellaneous income, notes receivable-credit & debit, property sales, receivable contracts - debit, mortgages payable-debit and

2. Debits: Selling commissions and loan costs. Each of the receipts shown on this analysis are the same as the entries made in the receipts and disbursement records (Exhibit ii) as to date, source and amount.

Exhibit U.

This Exhibit is an analysis of disbursements for the first six months of 1952. It is in the handwriting of Evelyn May McDonald and shows the date, the party to whom the disbursement was made, the check number, and the amount. The amounts are then spread or extended into various columns showing the purpose for which the check was issued, and includes the following catagories: withholding taxes payable, Federal old age, materials, labor, subcontracts, exchange, mortgages payable, interest, loan costs, taxes and insurance, savings accounts, notes payable and miscellaneous debits. The checks listed thereon are numbered from 5200 to 5898 and each check is accounted for. The checks entered on this analysis are the same date, to the same payees, in the same accounts and are numbered as shown on the receipts and disbursement records (Exhibit ii)

Exhibit V.

A statement of net worth of McDonald Brothers, Inc. as of July 1 1956 showing total assets of $574,445.49 consisting of current assets of $278,512.74 (including among other things savings account of $1,805.37, cash in bank of $1,357.37, and lots and homes under construction of $257,150.00); long term receivables of $218,522.75 (notes receivable $35,891.68 and contracts receivable $245.631.07); and machinery and equipment of $14,410.00. It also shows current liabilities of $177,030.47, long term payables of $175,392.98, stock $200,000 and surplus of $22,022.04.

222] Exhibit W.

A computation of taxes for J.S. McDonald for the year 1952 showing a net income from the partnership of $2,686.03, salary from McDonald Bros. Inc. of $2,935.46, an overstatement of income of $394.34 and a refund due on the 1952 tax of $81.58.

Exhibit X.

A schedule showing an inventory of contracts receivable for McDonald Bros. Inc. as of July 1, 1952 listing names and amounts, the total shown is $245.631.07. The persons listed are persons to whom McDonald had sold homes on contract prior to July 1,1952.

Exhibit Y:

A schedule showing an inventory of notes receivable of McDonald Bros. Inc., as of July 1, 1952, listing the names and amounts, the total of which is $35,891.68. The names listed thereon are those of persons who gave McDonald notes as part of the purchase price on homes sold to them prior to July 1, 1952.

Exhibit Z.

Receipts signed by Special Agent Daniel M. Smith acknowledging receipt by him on March 21, 1955 of receipts and disbursement records for period from July 1952 through

December 1954; check stubs from June 18, 1952 through March 4, 1955; and bank statements and cancelled checks for months from July 1952 through January 1955.

223] Exhibit AA.

A letter dated October 27, 1954 signed by J. S. McDonald as both President of McDonald Bros., Inc. and as a partner in McDonald Bros. addressed "To Whom it May Concern" authorizing any party to show agents of the Internal Revenue Service any records they possess reflecting business transactions with McDonald Bros., a partnership and McDonald Bros., Inc. for the years 1951, 1952, 1953 and 1954.

Exhibit BB.

Three cancelled checks drawn on the personal account of J. S. and May McDonald at the First Security Bank, Sugarhouse Branch, (31-65) each in the handwriting of and signed by May D. McDonald and made out as follows:

Date	Amount	Payee
2/10/49	$14.00	McDonald Bros.
12/12/50	15.92	May McDonald
5/12/51	117.58	J.S. McDonald

The $14.00 check is not endorsed but bears a stamp "credit to the account of McDonald Bros. Absence of Endorsement Guarenteed." The second is endorsed "May McDonald - McDonald Bros. Acct.". The third is endorsed "J. S. McDonald, McDonald Bros." and is in the handwriting of Mrs. McDonald.

Exhibit CC.

Two uncancelled checks drawn on McDonald Bros. account, each signed "May D. McDonald." Check #1942 is dated Aug. 9, 1949 and is made payable to Douglas McDonald for $30.00. The endorsement on the back is in the handwriting of Mrs. McDonald and reads "Douglas McDonald - May D. McDonald, cashed from Homer pmt." Check #1943 is dated Aug. 11, 1949, is made payable to Cash for $5.00, bears the word "stamps" on the front of it in Mrs. McDonald's handwriting and on the back is endorsed "May D. McDonald, cashed from Homer's payment."

224] Exhibit DD.

This exhibit consists of cancelled checks made payable to J. S. McDonald and drawn on the McDonald Bros. account at the First Security Bank, Sugarhouse Branch, as follows:

Check No.	Date	Amount	
1525	4/2/49	$1,500.00	(1)
1389	1/31/49	300.00	
1421	2/14/49	100.00	
1446	3/8/49	100.00	(2)
1473	3/12/49	100.00	
1477	3/16/49	256.54	(2)
1499	3/25/49	100.00	
1509	3/26/49	250.00	
1607	4/30/49	250.00	(2)
1699	5/28/49	25.00	
1704	6/2/49	250.00	
1812	7/5/49	250.00	
1917	8/5/49	250.00	
1982	8/26/49	50.00	
2015	9/6/49	950.00	
2128	10/10/49	250.00	(2)
2231	11/7/49	250.00	
2318	11/28/49	500.00	
2435	1/3/50	250.00	
2504	1/14/50	100.00	
2625	2/14/50	250.00	
2651	3/6/50	200.00	
2722	3/15/50	498.77	
2736	3/20/50	1,000.00	
2927	5/8/50	1,150.00	(2)
2999	6/2/50	100.00	
3051	6/9/50	150.00	
3086	6/19/50	150.00	
3182	7/10/50	250.00	
3248	7/29/50	250.00	
3358	8/22/50	100.00	
3383	9/1/50	250.00	
3456	9/13/50	100.00	
3474	9/22/50	55.00	
3507	10/4/50	250.00	
3638	11/1/50	500.00	
3753	12/2/50	350.00	
3855	12/30/50 or 1/2/51	720.00	

Check No.	Date	Amount	
3837	12/22/50	200.00	(3)
3978	2/1/51	600.00	
4099	3/5/51	500.00	(4)
4156	3/14/51	555.64	
4196	4/1/51	500.00	
4327	5/9/51	500.00	
4415	6/3/51	500.00	
4532	7/3/51	500.00	(4)
4648	8/2/51	500.00	
4758	9/1/51	500.00	
4869	10/4/51	500.00	
4939	10/17/51	109.56	
4988	11/8/51	750.00	
5108	12/10/51	150.00	
5170	12/19/51	350.00	

225] (1.) Signed by J. S. McDonald. All other checks signed by May D. McDonald.

(2.) Endorsement in handwriting of J. S. McDonald. All other endorsements written by Mrs. McDonald.

(3.) Endorsed by Mrs. McDonald as follows: "J. S. McDonald Pay to E. L. Douglas." Additional endorsement is E. L. Douglas, 476 Penny Aye."

Exhibit FF.

This exhibit consists of cancelled checks drawn on McDonald Bros. account at the First Security Bank, Sugar-house Branch, as follows:

Check #1517 dated 4/1/49 made payable to, signed and endorsed by J.S. McDonald, in sum of $10.00, and bearing stamped endorsement of the Salt Lake Blue Print & Supply Co.

Check #1595, dated 4/25/49, made payable to, signed and endorsed by J. S. McDonald, in sum of $5.00 and bearing stamped endorsement of the Salt Lake Blue Print & Supply Co.

Check #1654, dated 5/17/49, made payable to and signed

by May D. McDonald (not endorsed) for $10.00 bearing stamped endorsement of Holladay Lumber & Hardware Co.

Check #2325, dated 12/2/49 made payable to and signed by J.S. McDonald (not endorsed) for $5.00 and bearing stamped endorsement of Desert News Press & Publishing Co.

Check #2754 dated 3/30/50, made payable to, signed and endorsed by J.S. McDonald for $10.00 and bearing stamped endorsement of DeHaan Wallpaper Co.

Check #2826, dated 4/8/50 made payable to J.S. McDonald, signed May D. McDonald for $5.00 with words "stamp — envelopes" written on front, endorsed by J.S. McDonald.

Check #1424, dated 2/14/49, made payable to, signed and endorsed by J.S. McDonald for $5.00 and bearing stamped endorsement of Cummings Studio Candies.

226] Check #3615, dated 10/26/50, made payable to, signed and endorsed by J.S. McDonald for $10.00 and also endorsed by Douglas McDonald and Lester's Cafe.

Exhibit GG.

Cancelled checks drawn on the McDonald Bros. account at the First Security Bank, Sugarhouse Branch and made out as follows:

Check #1428, dated 2/19/49, made payable to J.S. McDonald signed by May D. McDonald, for $32.50, and endorsed by J.S. McDonald and "72nd Quorum of Seventy."

Check #1374, dated 1/20/49, made payable to and endorsed "72nd Quorum of Seventy" signed by May D. McDonald for $80.00.

Check #1564, dated 4/18/49, made payable to, signed and endorsed by J.S. McDonald for $45.00 and also endorsed by the Holladay First Ward J. Leroy Linton, Bishop.

Check #3558, dated 10/9/50, made payable to and endorsed by "The First Council of the Seventy, "signed by May D. McDonald for $5.00. On the face of the check appear

the words "Big Cottonwood Stake"

Exhibit HH.

This exhibit consists of two schedules in the handwriting of Mrs. McDonald and are an analysis of receipts and disbursements for the year 1951, showing similar information and breakdowns as shown in Exhibits T and U. The disbursements cover checks from #3856 to 5199 and all checks are accounted for. The data appearing on these schedules are the same as to dates, names, amounts and checks numbers as appears in the receipts and disbursement records. (Exhibit II) [It is not practicable to reproduce copies of exhibit II. The original exhibit is on file in the clerk's office.]

Exhibit JJ.

This exhibit consists of the check stubs and cancelled checks drawn on the McDonald Bros. account at the First Security Bank, Sugarhouse Branch (except those checks introduced as separate exhibits.)

227] The check stubs included commence with check stub #1301, dated Dec. 18, 1948 and ends with check stub #5314, dated 1/31/52. The stubs reflect that for the three years of 1949, 1950 and 1951, checks numbered from 1323 to 5200 were written during those years.

The cancelled checks included in the exhibit are those whose numbers run from #1323 to 5199 inclusive and are for the years 1949, 1950 and 1951. Almost without exception these checks were all written by Mrs. McDonald and bear her name, May D. McDonald, as maker.

The numbers, dates, amounts and payees on all checks and check stubs included in this exhibit are as listed in the receipts a[illegible] disbursement records kept by Mrs. McDonald (Exhibit ii)

Exhibit KK.

This exhibit consists of individual files on the persons to whom houses were sold by J. S. McDonald during

1949, 1950 and 1951. Each file contains miscellaneous papers and documents relating to the construction loans, disbursements of those loans, and sales data on the sale of the houses.

Included in the exhibit were amortization sheets showing collections on fifty separate notes and contracts executed by individuals who purchased homes from J.S. McDonald during the three years in question. The sheets show the date of payment, the amount, the allocation of the payment to interest, to principal and to taxes and insurance (in some cases) and the balances due on the principal. For each of the three years in question the amounts collected on each of the notes and contracts were duly entered in the receipts and disbursement records (exhibit ii) and are as set out in the schedules attached to the stipulation of June 25, 1956.

Exhibit LL.

Photostatic copy of cashier's check #61-4706 of the First Security Bank of Utah, Exchange Place Branch, in the amount of $1,500.00, made payable to J.S. McDonald, and endorsed as follows:

228] "Pay to the order of David T. Lewis, J.S. McDonald, Payment on note and mortgage, Scott Investment Company" "Pay to the order of M. Kenneth White, Mahouri M. White, Woodrow D. White, Verdi White, White Distribution and Supply Co., David T. Lewis." "White Distributing & Supply Co. by V. A. White, Verdi White, Mahouri M. White, M. Kenneth White, Woodrow D. White."

Exhibit MM.

Original application for Mortgage Loan filed with Prudential Insurance Co. of America on Lot 14, Vaughn Subdivision, signed by J.S. McDonald 6/17/49 on which his annual income is shown as $6,000.00.

Exhibit NN.

Contracts receivable installment sales and deferred profits (Three copies have been filed.)

McDonald vs. United States of America

Exhibit OO.

This exhibit consists of a summary analysis of personal deposits to the account of J.S. and May McDonald in the First Security Bank, Sugarhouse Branch, and drawings from McDonald Bros. account during each of the years 1949, 1950 and 1951.

For the year 1949 the total deposits to the personal account was $4,306.54 $4,181.54 of which were by checks drawn on McDonald Bros. account and which checks consisted of the checks listed in Exhibit DD as having been issued in 1949 except Check #1525 and 1982. The additional deposits of $125.00 to this account came from sale of calf - $100.00, sale of berries $15.00, and a check of $10.00 received from a son. This summary also lists other drawings from McDonald Bros. of J.S. McDonald as disclosed by the receipts and disbursements book (Exhibit ii) which may be summarized as follows:

For church purposes	$157.50
Check #1982	50.00
Cash withdrawn 6/13/49	35.00
	$242.50

The schedule also added $2,200 for the 1948 Oldsmobile car taken in as a down payment on the Carlston Home, for total drawings from McDonald Bros. of $6,624.04.

229] For the year 1950, the total deposits to the personal account was $6,286.68, $5,953.77 of which were by checks drawn on McDonald Bros. account and which checks are the checks bearing a 1950 date and listed in Exhibit DD, except check 3855. The additional deposits to the personal account from sources other than McDonald Bros. totaled $332.91 and in part was identified as coming from Mrs. DeJulio ($129.00) and a $50.00 gift from a sister. $153.91 are not identified as to source on the schedule. The schedule also lists other drawings from McDonald Bros. as identified from the cash receipts and disbursements records (Exhibit ii) as follows:

For church donations	$20.00
Check #3837 to J.S. McDonald endorsed to Douglas	200.00
Check #3855 drawn 12/30/51 and deposited Jan, 1951	720.00
Cash drawn 12/11/50	80.00
	$1,020.00

For the year 1951, the total deposits to the personal account were $7,927.12, $720.00 of which were 1950 drawings. Of the difference of $7207.12, $6,515.20 consisted of the deposit of checks drawn on McDonald Bros. account and are those checks listed in Exhibit DD bearing a 1951 date. The additional deposits, totaling $691.92, were identified in the summaries as coming from the following sources:

Deposit of funds of son Douglas	$425.17
Sale of Calf	52.00
Mrs. DeJulio	28.00
Cash of McDonald Bros. deposited replaced in McDonald Bros. account by personal check 5/12/51	86.75
Unidentified	100.00
	$691.92

Other drawings from McDonald Bros. as identified from cash receipts and disbursements records was a check of $655.37 for 1951 income tax. Total drawings from McDonald Bros. are shown as $7,170.57.

Exhibit PP.

230] This exhibit consists of three accounting schedules, one for each of the years 1949, 1950 and 1951, analyzing cash receipts per books and deposits in the McDonald Bros. Account at the First Security Bank, Sugarhouse Branch. It also contains an analysis of receipts not deposited in the bank. The bank deposits shown on the bank statements (Exhibit L) are tied in to receipts per books in these schedules and are completely identified from sources contained in the schedules and receipts as shown in the books (Exhibit ii). These schedules each include summaries and those for 1951 contain the following information:

1951

Total Receipts Per Books		$371,322.70
Source of Receipts:		
Proceeds from sales of homes in 1951	$48,767.36	
Collections on 1951 notes and contracts - including interest	24,571.86	
Subcontract work & miscellaneous sales	24,110.08	
Reimbursement of advanced costs	4,255.36	
Collections on contracts from sales in prior years	38,878.93	
Loans - First Security Bank	19,860.00	
Construction Loans:		
Western Loan & Bldg.	162,454.11	
Prudential Federal	46,975.00	
Overpayment on home sale - refunded	1,450.00	
		$371,322.70

Total Deposits, First Security Bank	371,019.14
Undeposited	303.56

The items making up the undeposited receipts were set out in the schedule and were in conformity with entries in the receipts and disbursement records.

The schedules for 1949 and 1950 contained a similar breakdown. For 1949 total receipts per books were $289,267.46, total deposits were $287,692.46, of which $170,513.04 were deposits of loans. For 1950, total receipts per books were $370,358.37, total deposits were $360,767.17, of which $226,952.12 were deposits of loans. Of the differences between receipts and deposits in both years, the disposition of the receipts not deposited was fully accounted for in the schedules and corresponded with entries in the records.

231| Exhibit QQ.

This exhibit is a certified copy of the Articles of

Incorporation of McDonald Bros., Inc. which were executed on June 30, 1952 and listed the total net assets of McDonald Bros., a co-partnership, as follows:

Assets:

Cash	$3,362.74	
Inventory of Bldg. Materials.	8,000.00	
Real Estate	257,150.00	
Receivables	291,522.75	
Machinery	14,410.00	
Gross Assets		$574,445.49

Liabilities:

Current Liabilities:		
Notes Payable	$27,530.47	
Accounts Payable	20,000.00	
Mortgages Payable	129,500.00	
Long Term Payables		
Mortgages	166,190.58	
Notes-machinery	9,202.40	
	$352,423.45	
Net Fair Cash Value		$222,022.04

The articles also reflected that of the total number of shares of stock subscribed (20,000) 9997 were issued to J.S. McDonald and 9997 to Stevenson McDonald.

Filed Oct. 4, 1956.

240] Certificate Of Clerk.

I, O.K. Clay, Clerk of the United States District Court for the District of Utah, do hereby certify that the foregoing pages numbered from 1 to 239 contain the complete original record and proceedings (except Exhibits,) as requested in the defendant and appellant's Designation of Record on Appeal and as requested in the plaintiff and appellee's Designation of Record on Appeal in Criminal 63-56, United States of America, Plaintiff and Appellee vs. Joseph F. McDonald, Defendant and Appellant.

The Exhibits are being sent under separate cover.

In Testimony Whereof, I have hereunto subscribed my name and affixed the Seal of the aforesaid Court at Salt Lake City, Utah, this 6 day of October, 1956, and the 180th year of the Independence of the United States of America.

(Seal) O. K. Clay, Clerk.

Filed United States Court of Appeals Tenth Circuit October 9, 1956, Robert B. Cartwright, Clerk.

Office - Supreme Court.
FILED
AUG 20 1958
JOHN T. FEY, Clerk

No. 392

IN THE SUPREME COURT
of the
UNITED STATES

OCTOBER TERM, 1957

JOSEPH S. McDONALD,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent,

PETITION FOR A WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

BRYANT H. CROFT
EARL P. STATEN

Counsel for Petitioner
351 South State Street
Salt Lake City, Utah

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No._____

IN THE SUPREME COURT
of the
UNITED STATES

OCTOBER TERM, 1957

JOSEPH S. McDONALD,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent,

PETITION FOR A WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner Joseph S. McDonald prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above entitled case on June 20, 1957.

OPINIONS BELOW

There was no opinion in the District Court. The opinion of the Court of Appeals has not been reported and is printed in Appendix A hereto, infra, p. 9.

JURISDICTION

The judgment of the Court of Appeals was entered on June 20, 1957. (Infra, Appendix A, p. 9). Rehearing was denied on July 22, 1957. (CA. R., p. 18) The jurisdiction of this Court is invoked under 28 USCA 1254(1) and Rule 22(2) of the Supreme Court Rules.

QUESTION PRESENTED

1. Did the Court of Appeals err in sustaining an erroneous exclusion of evidence by the trial court on the grounds that petitioner made no offer of proof concerning the evidence excluded where the trial court, in preliminary colloquy, declared in advance that evidence of such a nature was not admissable, and where the question clearly admits of an answer favorable to petitioner?

STATUTE INVOLVED

The statute involved in this case is 26 USCA 145(b) (1939 Code) which reads as follows:

> "Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

STATEMENT OF THE CASE

This petition seeks to review the judgment of

the Court of Appeals affirming a judgment convicting the petitioner of violation of 26 USCA 145(b) (1939 Code).

The indictment contained three counts, each charging petitioner with a willful attempt to defeat and evade a large part of the income tax due and owing to the United States by filing false income tax returns for each of three years. (T. 3, 4) Petitioner was tried to a jury and was acquitted on two counts and convicted on the third. (T. 7)

In the preparation of his returns petitioner, a builder, had omitted reporting the sales of houses (T. 146-148) and had, through a lack of understanding, (T. 105) erroneously shown as sources of most of the income returned the two lending institutions from which he had borrowed money to build his houses, and from which he had in fact received no income. (T. 105-108).

One of the witnesses called by the government was a certified public accountant with whom petitioner had consulted concerning his returns shortly after filing his income tax return for the year 1951, (T. 53) the year covered by the count on which conviction was obtained. (T. 4, 7) During cross examination counsel for petitioner made the accountant his own witness and asked the witness whether he had questioned petitioner as to why he had listed the sources of income shown on the tax returns. The witness replied that he had particularly asked petitioner concerning the same, whereupon the court interceded, invited an objection from the government, stated such conversation was not admissible in evidence, and excluded the same,

notwithstanding counsel's suggestion that statements by an accused person to third parties showing his state of mind were admissible. (T. 57-58)

The Court of Appeals, conceding as contended by petitioner that such statements or conversations under proper circumstances were admissible, took the position that even though the Rules of Criminal Procedure do not contain a provision comparable to Rule 43(c) of the Rules of Civil Procedure under which a party may make an offer of proof where an objection has been sustained to a question, an offer of proof was "nonetheless appropriate and proper" and that in the absence of an offer of proof, the court was unable to say whether reversible error resulted from the trial court's ruling, and thereupon affirmed the judgment. (Appendix A, p. 11, 12)

ARGUMENT ON REASONS FOR GRANTING WRIT

1. The decision of the Court below is in conflict with the ruling of this Court in *Buckstaff* v. *Russell & Co.*, 151 U.S. 626, 38 L. Ed. 292, wherein this Court stated:

> "If the question is in proper form and clearly admits of an answer relevant to the issues and favorable to the party on whose side the witness is called, it will be error to exclude it. Of course, the Court, in its discretion, or on motion, may require the party, in whose behalf the question is put, to state the facts proposed to be proved by the answer. But if that be not done, the rejection of the answer will be deemed error or not, according as the question, upon its face, if proper in form, may or may not clearly admit of an answer favorable to the party in whose behalf it is propounded."

Petitioner was charged with an attempt to evade taxes by filing a false income tax return. Any statement made by petitioner to a certified public accountant as to why he prepared his return in the manner that he did would have a very relevant and material bearing on intent, and particularly where, as here, such statements were made *before* any investigation was started by the Internal Revenue Service (T. 18, 55) and *shortly after* filing the 1951 return covered by the count on which conviction was obtained. (T. 110) The trial court not only did not require petitioner to state the facts proposed to be proved by the answer, but without objection from the government, proclaimed in no uncertain terms that such evidence was not admissible. (T. 57, 58) The witness had already testified that he had had a discussion with petitioner, had told petitioner his returns were incorrectly prepared, and had been told by petitioner he wanted to correct those returns. (T. 55) The government had refrained from asking the witness on direct examination of conversations the witness had had with petitioner concerning the preparation of his returns. (T. 55) Under these circumstances the question on its face clearly admits of an answer favorable to petitioner.

The decision of the Court below is also in conflict with the rule announced by the Court of Appeals, 9th Circuit, in *Greatreaks* v. *U. S.*, 211 F. 2d 674, to the effect that where, as here, (T. 58) the Court declares in advance that the entire class of testimony offered is inadmissible, no further offer of evidence is needed.

2. The question as to where, and if so, when and under what circumstances an offer of proof should be made in criminal cases in the Federal Courts to save an error of the trial court on review is of major importance in the trial of criminal cases. The Rules of Criminal Procedure are silent on the matter, while under Rule 43(c) of the Rules of Civil Procedure,[1] an offer of proof is provided for but the wording of the rule makes such an offer permissive, not mandatory. It is thus by no means apparent from the rules that in a criminal case an offer of proof is mandatory. The goal of the Federal Rules of Criminal Procedure is to achieve uniformity of rules applicable in trials of criminal cases in the Federal Courts. Only the courts can clarify such rules. With respect to the matter of an offer of proof in criminal cases, the lower courts have not done so.

The court below, in ruling that an offer of proof was "nonetheless appropriate and proper", cited in support thereof the trial court's opinion in *United States* v. *Peckham*, 105 F. S. 775. On an appeal in the Peckham case the Court of Appeals for the District of Columbia, reported in 210 F2d 693, in commenting on this ruling by the trial court, said:

> "When the examination is direct, a proffer, though usual, is not invariably required to obtain review of exclusion of a question."

It is believed that this Court's ruling in the Buckstaff case, supra, is or should be applicable to criminal cases. In the interest of fairness and justice and to achieve uniformity in criminal cases, this court should grant the writ herein petitioned for to establish a

(1) Appendix B, infra, p. 12

clearly defined procedural rule respecting offers of proof that will bring about a uniform application thereof in criminal cases in the Federal Courts.

3. The decision of the Court below is erroneous. The Court of Appeals concedes that under its own prior rulings[1] such conversations as those attempted to be shown by the witness were, under proper circumstances, admissible to show absence of a willful or unlawful intent to evade income taxes (Appendix A, p. 11). Yet the Court of Appeals, after conceding the error of the trial court, resolves that error against petitioner and in favor of the government which admittedly refrained from having its own witness testify as to such conversations. (T. 55) The Court of Appeals did so on the theory that an offer of proof should have been made, without which the court was unable to say that reversible error resulted from the exclusion. (Appendix A, p. 12) As stated above, the rule is to the contrary. The evidence related to reasons why an erroneous return was filed. The exclusion of such evidence in a tax evasion case, wherein the attempt alleged is the filing of a false return, is clearly prejudicial. Under our system, where doubts ought to be resolved in favor of the person accused, the erroneous ruling of the Court of Appeals should not be allowed to stand.

(1) Miller v. United States, CA-10, 120 F2d 968
Haigler v. United States, CA-10, 172 F2d 986

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

BRYANT H. CROFT
EARL P. STATEN
Counsel for Petitioner

PROOF OF SERVICE

I, Bryant H. Croft, of counsel of record for petitioner and a member of the bar of the Supreme Court of the United States, do hereby certify that on the 16th day of August, 1957, I served, on behalf of petitioner herein, copies of the foregoing Petition for Writ of Certiorari on the United States by leaving a copy thereof at the office of A. Pratt Kesler, United States Attorney for the District of Utah, at Room 200 Federal Building, Salt Lake City, Utah, and by mailing two copies thereof in a duly addressed envelope with air mail postage prepaid to the Solicitor General, Department of Justice, Washington 25, D.C.

BRYANT H. CROFT

Of Counsel of Record for Petitioner

APPENDIX "A"

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

MAY TERM, 1957

JOSEPH S. McDONALD,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

} Number 5496

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

Filed June 20, 1957

Bryant H. Croft (Earl P. Staten was with him on the brief) for Appellant;

C. Nelson Day, Assistant United States Attorney, (Charles K. Rice, Ass't Attorney General, Joseph M. Howard, Atty. Dept. of Justice, and A Pratt Kesler, United States Attorney, were with him on the brief) for Appellee.

Before HUXMAN, PICKETT and LEWIS, United States Circuit Judges.

HUXMAN, Circuit Judge.

Appellant Joseph S. McDonald was tried in the United States District Court for the District of Utah on a three count indictment charging violations of 26 U.S.C. § 145(b),[1] (income tax evasion). He was acquitted on counts one and two and found guilty on count three. A sentence of eighteen months' imprisonment and a fine of $10,000 was imposed. The principal ground relied upon for reversal is that the sentence imposed by the court is illegal and void in that the allegations of count three constitute a violation of 26 U.S.C. § 3616(a)[2] and that the sentence imposed is in excess of the maximum allowed by Section 3616(a). Whatever basis there may have been for this argument has been laid to rest by the decision of the Supreme Court in *Achilli* v. *United States*, decided May 27, 1957. The court there held that Section 3616(a) does not apply to income tax law violations and that all such offenses arise under and are controlled by Section 145(b). It follows that appellant was properly charged under Section 145(b) and that

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[1] Section 145(b)

"(b) Failure to collect and pay over tax, or attempt to defeat or evade tax.

"Any person required under this chapter to collect, account for and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

[2] Section 3616(a).

"Whenever any person —

(a) False returns.

Delivers or discloses to the collector or deputy any false or fraudulent list, return, account, or statement, with intent to defeat or evade the valuation, enumeration, or assessment intended to be made; or, * * * ."

the sentence imposed being within the maximum authorized by that section is not excessive.

Other assignments of error need be noted only briefly. We are satisfied that count three adequately charged appellant with willfully and knowingly attempting to evade income taxes and that the evidence, if believed by the jury as it was, was sufficient to sustain the charge.

Without amplification we think it is sufficient to say that no reversible error was committed in excluding appellee's exhibits HH and QQ.

It is contended that the court erred in excluding evidence appellant sought to elicit from Lyle D. Dickson, a Government witness, who was made appellant's witness. Dickson was a certified public accountant who had testified for the Government. He had audited appellant's books. He was asked about conversations he had had with appellant while examining his books. Specifically he was asked, "Did you ask Mr. McDonald why he listed on his returns the various sources of compensation that were shown on the returns?" An objection was sustained to this question. It may be conceded as contended for by appellant that such statements or conversations under proper circumstances are admissible to show absence of a willful or unlawful intent to evade income taxes.[3] The difficulty is that no offer of proof of what appellant intended to prove by this witness was made. While the Rules of Criminal Procedure do not contain a provision comparable to Rule 43(c) of the Rules of Civil Procedure under

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[3] See Miller v. United States (10th Cir.) 120 F. 2d 968; Haigler v. United States (10th Cir.) 172 F. 2d 986.

which a party may make an offer of proof where an objection has been sustained to a question, an offer of proof is nonetheless appropriate and proper in order to make a record of what examining counsel expects to elicit from the witness if the witness were permitted to answer the question.[4] In the absence of an offer of proof, we do not have the testimony before us and are thus unable to say that reversible error resulted from the court's ruling sustaining the objection to the question.[5]

An examination of the record in this case leads to the conclusion that no reversible error was committed, and the judgment is accordingly AFFIRMED.

APPENDIX "B"

43(c) RULES OF CIVIL PROCEDURE

"Record of Excluded Evidence. In an action tried by a jury, if an objection to a question propounded to a witness is sustained by the court, the examining attorney may make a specific offer of what he expects to prove by the answer of the witness. The court may require the offer to be made out of the hearing of the jury. The court may add such other or further statement as clearly shows the character of the evi-

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[4] United States v. Peckham, 105 F. Supp. 775, 777.

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[5] Hunt v. United States, 231 F. 2d 784;
Christoffel v. United States, 200 F. 2d 734;
Elder v. United States, 202 F. 2d 465.

dence, the form in which it was offered, the objection made, and the ruling thereon. In actions tried without a jury the same procedure may be followed, except that the court upon request shall take and report the evidence in full, unless it clearly appears that the evidence is not admissible on any ground or that the witness is privileged."

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FILED
OCT 7 1957
JOHN T. FEY, Clerk

No. 392

IN THE SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1957

JOSEPH S. McDONALD,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY TO THE BRIEF OF THE UNITED STATES IN OPPOSITION

BRYANT H. CROFT
EARL P. STATEN
Counsel for Petitioner
351 South State Street
Salt Lake City, Utah

No. 392

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY TO THE BRIEF OF THE UNITED STATES IN OPPOSITION

The brief of the United States in opposition to the petition for a writ of certiorari has brought up new matter of some significance not adequately treated in the petition, and pursuant to the provisions of Rule 24(4) of the Supreme Court Rules, this reply is submitted to briefly consider said new matter.

1. On pages 6, 7 and 8 of its Brief, the Government asserts that since the statements made to the witness which defendant sought to introduce were not made prior to or contemporaneously with the preparation and filing of the return, such statements were inadmissible. In doing so, the Government on page 8 of the Brief states the case of *Haigler* v. *United States* 172 F. 2d 986 (CA-10) is distinguishable.

In *Haigler v. United States*, the Court of Appeals, Tenth Circuit stated:

> "We have said that where, as here, motive or bad purpose is an essential element of the offense charged, the accused may not only directly testify that he had no such motive or purpose, but he may, within rational right, buttress such statement with testimony of revelant circumstances, including conversations had with third persons or statements made by them, tending to support his statement . . . ' *Miller* v. *United States*, 10 Cir., 120 F. 2d 968, 980."

Part of the evidence excluded in the Haigler case, as stated by the Court, was testimony that defendant

> ". . . called to the attention of his auditor the balance of approximately $5,000.00 in the account *about thirty days after his income tax return had been filed*, and that he understood, or was led to believe, that it would be reflected in an amended return." (Emphasis added).

The Court ruled that this, together with other excluded testimony, was "plainly admissible as bearing upon the essential element of intent," and that it was error to exclude it.

Petitioner herein first consulted the accountant a month or two after the 1951 return was filed.

2. Since the Government in its Brief set out in its "Statement" a summary of the evidence to support the verdict, and this summary does not accurately and fully summarize all of the evidence, petitioner deems it necessary to make a further statement with respect thereto.

Most of the evidence summarized by the Government applied equally to the first two counts on which an acquittal was obtained. The evidence on the third count had the added feature that the 1951 return was filed after petitioner obtained the idea at a convention that he had been filing his returns incorrectly. (T. 109, 118) Consequently what he did and said to a C. P. A. shortly after filing the 1951 return takes on added significance as bearing upon intent.

The Government's Brief asserts petitioner reported only the amount he determined had been spent on personal expenses, determined by those checks issued for such purposes. This is inaccurately stated. Petitioner drew one or two checks each month on the business account, made payable to himself, which he deposited in his personal account. (T. 89, 174) Only on two or three occasions during the three years were checks on the business account written for personal expenditures. (Exh GG, T. 176) These checks to self were deemed by the petitioner and his wife to be petitioner's income. These are the checks that were totaled to arrive at reported income. (T. 90) Petitioner and his wife believed that nothing received from the sale of houses, for subcontract work or for interest, was income until petitioner withdrew the money from the business for personal use. (T. 90, 108) Practically all

of the increases in net worth over the years were due to increases in notes and contracts receivables (T. 162) and petitioner's concept of income was that such would be income only when cash payments were received and withdrawn for use by him as an individual, separate and apart from the business. (T. 90, 108)

The Government alleges (Br. p. 4) these sums withdrawn for personal use were reported as "wages," and that none of the firms or individuals listed had paid wages to petitioner. Sources of income were listed in the space provided for listing "wages, salaries, bonuses, commissions and other compensation." (T. 146, 147) There was no representation that they were "wages." On the contrary, no withholding tax was shown as having been withheld, (T. 146, 147) the total of income shown as received of $7,135.00 was shown in Schedule C as being receipts from business *as well as from self-employment.* (T. 147, 148) Sutherland and Schofield both paid him compensation for work done. (T. 108)

The Government suggests that petitioner refused to permit inspection of his receipts and disbursement records (Br. p. 5). The complete facts ought to be stated. The Revenue Agent, when he began the investigation, was in petitioner's home on several occasions, was given access to everything he desired (T. 89) and certain requested records were turned over to him. (T. 20, 21) Counsel was consulted after the Special Agent entered the investigation. The Special Agent was advised that Counsel could not intelligently advise petitioner concerning his records until a study was made of them. (T. 80, 81) The Agent immediately ex-

pedited his investigation and forwarded the case within six months to save the year 1949. (T. 78, 79, 81) During the investigation, at a conference and before trial many facts were furnished to the Agent by Counsel (T. 14, 80, 82, 84).

Many other facts not mentioned by the Government show innocence of tax evasion motives and a lack of understanding. Petitioner each quarter filed employment tax returns. (T. 166) Upon one an amendment was voluntarily made and additional tax paid. (T. 166) The lending institutions from whom petitioner *borrowed* money were listed as sources of income. (T. 108) The receipt and disbursement of all monies were accurately and properly entered in the records. (T. 14) With one or two nominal exceptions, which were noted on the records, all funds were deposited in the business bank account. (T. 180, 181) Upon three occasions petitioner's wife, who kept all records and wrote practically all the checks, (T 177) used funds in small amounts received on collections. These were repaid to the business bank account by checks drawn on the personal account. (T. 90, 91, 170, 173) In support of the fact that petitioner considered his income to be only what he withdrew from the business is the very important fact that whenever petitioner filed a financial statement with lending institutions and was required to state what his annual income was, he placed it at $6,000.00 or $7,000.00, consistent with what he reported.[1] (T. 47, 109, 152, 153, 169, 170, 171) On financial statements one would ex-

(1) He so stated on nine different occasions in 1948, 1949, 1950 and 1951.

aggerate, not minimize, his income. After learning at the Convention that he apparently had been preparing his returns incorrectly, he filed his 1951 return as he had done in the past and then consulted an attorney and a C. P. A., (T. 110) and the C. P. A. and petitioner's wife began working on the books to correct the matter. (T. 111)

This is a case of failing to file a correct return through ignorance and a lack of understanding. The conviction, fine and imprisonment on the third count is a serious miscarriage of justice. It should not be allowed to stand.

Respectfully submitted,

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PROOF OF SERVICE

I, Bryant H. Croft, of counsel of record for petitioner and a member of the bar of the Supreme Court of the United States, do hereby certify that on the 5th day of October, 1957, I served, on behalf of petitioner herein, copies of the foregoing Reply to Brief of the United States in Opposition by leaving a copy thereof at the office of A. Pratt Kesler, United States Attorney for the District of Utah, at Room 200 Federal Building, Salt Lake City, Utah, and by mailing two copies thereof in a duly addressed envelope with air mail postage prepaid to the Solicitor General, Department of Justice, Washington 25, D. C.

BRYANT H. CROFT
Of Counsel of Record for Petitioner